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ARTICLES

LEGAL MALPRACTICE: A CALCULUS FOR REFORM

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I. INTRODUCTION

Our most distinguished professions do not maintain congruency between membership standards and actual performance. This deficiency is manifest; spiraling malpractice litigation witnesses a substantial increase in both the number of suits and the amount of recovery.[1] Neither the professions nor public can long endure this trend. Governmental and possibly lay intervention in profession[2] affairs is imminent unless the professions move decisively to understand better the dynamics of malpractice and do excise its causes.[3] This article examines professional malpractice and existing responses to it, relates various causes in a calculus that can be employed to anticipate systemic patterns of malpractice, and suggests several

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1. *Malpractice Woes Hit Attorneys As Lawsuits Against Them Increase,* Wall Street Journal, Feb. 3, 1976, at 1, col. 1; Palmer, *It's Time To Stop Talking,* JOURNAL OF ACCOUNTANCY, Oct. 1975 at 60; Sheehan, *The Medical Malpractice Crisis in Insurance: How It Happened and Some Proposed Solutions,* FORUM, Fall 1975 at 80; R. Kroll, *Legal Malpractice: Chasing After Insurance, Free Lawsuits,* 4 STUDENT LAWYER No. 9, at 10 (May 1976).

2. "Profession" rather than "professional" is used frequently as an adjective to emphasize the "entity" aspect of profession.

3. "The medical profession has long insisted that it can best police its own ranks, and it should. Yet, unless all of the agencies involved in medical discipline work together to improve their methods, outsiders conceivably could take over the control of medical discipline. This must not happen." Derbyshire, *Medical Ethics and Discipline,* 228 J.A.M.A. 59, 62 (April 1, 1974). Professional Standards Review Organizations [hereinafter referred to as PSRO's] have already imposed some outside control on the medical profession.

The medical profession does not stand alone as being subject to outside control the concept is also applicable to the legal and accounting professions. *See,* Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence,* UTAH L. REV. 463 (No. 3 Fall 1974) [hereinafter cited as Parker].

The Securities Exchange Commission has disciplined several accounting firms for misconduct. *See, e.g., Laventhol, Kerstein, Horwath & Horwath,* Accounting Series Release No. 144 (May 23, 1973), CCH FED. SEC. L. REP. ¶ 72, 166; *Touche Ross & Company,* Accounting Series Release No. 153, CCH FED. SEC. L. REP. ¶ 72, 175.

approaches that should inhibit the development of such systemic patterns.

II. MALPRACTICE—WHAT IS IT?

A. A Word

Malpractice is both a word and a concept. Its import as a word is simple—being the binding of a common prefix and noun. The noun, "practice", connotes a skill gained by experience, study, or both. Members of learned professions like medicine, law, and accounting, as well as many occupations not viewed as professions, possess a variety of specific skills and an understanding of particular methods for applying those skills to achieve particular ends. What distinguishes learned professions from occupations is that the specific skills of a profession are methodically applied according to certain scientific, historical, and scholarly principles, which all members recognize by force of organization of concerted opinion among themselves.[4] The learned professions view themselves as responsible for insuring continued improvement of their understanding of such scientific, historical, and scholarly principles.[5] Improved understanding permits continuous development of skills and methods that more efficiently and effectively achieve desired results and, thus, better serve the public interest.

When "practice" is joined with the prefix, "mal", it may mean a number of things in the context of learned professions. It may mean: (1) professional skills are not applied, (2) professional skills are applied in a manner not consonant with professional standards, (3) such skills are applied so as to produce results incongruent with results normally associated with faithful observation of performance standards, or (4) member knowledge of scientific, historical, and scholarly principles underlying such skills and methods is not improved at the rate possible due to lack of profession or member diligence. There are numerous examples of such malpractice class in each of the learned professions. Shepherdizing, suturing, and balancing are skills fundamental to the professions of law, medicine, and accounting respectively. If a profession-member does not know how to execute basic professional skills, but seeks to handle a

4. *See,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1963). *See also,* Cogon, *Toward a Definition of a Profession,* 23 HARV. L. REV. 33, 36 (1953).

5. *See;* R. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography,* 10 LAW & SOC. REV. 9, 16 (1975); L. Mayhew, *Changing Practices in Education for the Professions,* SOUTHERN REGION EDUCATION BD. RESEARCH, MONOGRAPH NO. 17, pp. 1-2 (1971); F. Allen, *The Causes of Popular Dissatisfaction with Legal Education,* 62 ABA JOURNAL 447 (April 1976); REPORT TO THE PRESIDENT OF THE UNIVERSITY FOR THE YEAR 1974-75 FROM THE UNIVERSITY OF MICHIGAN LAW SCHOOL.

professional task requiring such skills, malpractice exists. Malpractice also exists if a professional fails to shepardize a key case in an appellate brief focusing on a developing area of law, sutures a wound with unserile instruments, or balances books with figures not supported by documents having at least facial validity. Even if technical application of a skill was correct, malpractice would still exist if the results sought by the public, or an individual, could be better obtained by proper application of another skill.[6] Finally, one might argue that malpractice exists when the profession or a profession-member is unable to obtain an optimal solution to a problem of an individual or society solely because of lack of diligence in advancing its or his knowledge of scientific, historical, and scholarly principles underlying profession skills and methods.[7]

B. A Concept

A profession's ultimate utility to society depends on both the quantity and quality of its efforts to understand and minimize the four types of malpractice. Theoretically the four-part definition of malpractice is sufficiently broad to encompass all learned professions. In practice, however, there is no uniformity among the conceptions of malpractice developed by each profession, and each profession's conception is much narrower than the etymology of the word.

The nature of, and reasons for, these deviations between the word and concepts developed by each profession, as well as deviations between each profession's concept, provide the insights needed to cope efficiently with the mounting problems of professional malpractice. Four factors appear to be fundamental to each profession's concept of malpractice. These factors focus on: (1) the interests harmed by malpractice; (2) the assumptions made by those dealing

6. For example, a surgeon may choose to perform a radical mastectomy on a female patient suffering from breast cancer rather than treat her with equally effective non-surgical treatment. Although he may complete the surgery and removal of the breast with perfection, the selection of treatment may cause severe psychological problems for his patient, problems which might not arise during the treatment phase of the alternative method. If the surgical choice stems from ignorance of available alternatives, undoubtedly malpractice exists. *See,* Crile, *Breast Cancer and Informed Consent,* J. OF L. AND MED. 18 (July/Aug. 1973).

7. As an example, lawyers have developed many mechanisms to serve societal interests which research now suggests in fact have serious detrimental effects. Some of these effects could have been anticipated before the mechanisms became operational. In other situations the mechanisms remain operational even though their defects are now known. *See,* THIBAUT & WALKER, PROCEDURAL JUSTICE, pp. 54-66 (1975); Walker, Thibaut & Andreoli, *Order of Presentation at Trial,* 82 YALE L.J. 216-226 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); Mashow, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims,* 59 CORN. L.R. 772 (1974); and ROBINSON & GELLHORN, THE ADMINISTRATIVE PROCESS, pp. 3-18 (West 1974).

with malpractice about the forces most responsible for its presence; (3) the measures used to detect its presence; and, (4) the approaches used to cope with detected presence.

1. Who is harmed?

Ideally the malpractice concept of a learned profession such as the law should strive to protect four constituencies affected directly or indirectly by professional action. The institutions or individuals embodying these constituencies are: (1) clients immediately served by profession-members; (2) persons other than the clients interested politically, economically, socially, or emotionally in the transaction or transaction class; (3) the general society affected by the professional services rendered to various client classes; and, (4) the profession involved in the transaction.

Harm from malpractice is most evident when it affects the individual. Codes of professional conduct dwell extensively on the various interests of the client, and implicitly assume that faithful service to the client fully discharges the profession's obligation to society. Suits against members of various professions grounded upon theories of malpractice are almost exclusively reflections of harm to this particular class.

Harm to the client can seldom exist without producing subsidiary harms to close associates of the client or to individuals and groups, who may at one time or another become associated with similar types of legal transactions. Although measurable adverse impact upon these parties exists, their interests are seldom accounted for in current calculi of malpractice. Undoubtedly, the magnitude of potential harm to this group warrants some accommodation by professional malpractice concepts.[8]

8. There are many recognized instances when harm to clients also involves harm to other individuals or groups. If an attorney fails to properly draft a will, not only is his client harmed by the failure of the instrument to effectuate his intent, but potential heirs are harmed when they do not receive benefits which would have been bestowed by a properly drafted will. An ill-prepared attorney may allow an appellate court the opportunity to establish precedent detrimental to his client. The precedent then presents an impediment which must be overcome in future proceedings. The resulting harm has direct impact on the immediate client as well as on those interests which must contend with the established precedent in the future.

Important group interests are also affected in less obvious but equally significant ways. Many diverse ethnic groups exist, each with a set of values differing markedly from mainstream cultural values. The values form the foundation for important relationships among group members. A lawyer insensitive to the values of a client from a particular ethnic group may offer him a legal alternative or course of action consistent with mainstream values but contradictory to his peculiar ethnic values. If the client accepts such advice and acts in reliance thereon, a significant contribution is made concerning the de-emphasis of traditional ethnic values cementing relationships among members of his group, an important consequence for the entire group. Conn & Hippler, *Justice in the Far North: Conciliation and Arbitration in the Native Village and the Urban Ghetto*, 58 JUDICATURE 229 (Dec. 1974).

Society, too, has an interest in the most efficient and effective resolution of legal disputes. By definition, transactions involving malpractice are inefficient, and thus indirectly harm society. Further, the rapid expansion of government, and the increasing presence of lawyers in policy-making positions within government, establish the conditions for direct harm to society.[9] If programs and policies of government at any level are fashioned by lawyers performing below professional standards, the immediate adverse economic and social consequences can be extremely large, although the consequences to any particular individual may be small.[10]

Harm to others rarely occurs without ill effects for the profession. A breach of professional confidence by one lawyer may make other clients in the same community, especially those involved in similar transactions, less trusting of their own lawyer's integrity. The magnitude of harm to the profession is proportionate to the extent that the breach of professional standards involves the subjective trust of outsiders. Such trust is quite different in importance than that which can be objectively evaluated by other clients with regard to their own affairs. To the extent these fundamental trust relationships are jeopardized by the misconduct of a single profession-member, other profession-members will find it more difficult to efficiently and effectively operate in fields where these trust relationships are central to the task being performed.

2. *Profession Assumptions in Defining Malpractice*

If each of the constituencies served by a profession developed a malpractice concept to secure optimal self-protection, a multitude of meanings would emerge. Such a diversity of meaning is not evident in the literature of the professions. Normally each profession develops a single nebulous conceptualization to serve all interests.

The legal profession, in light of its skills and working environment, views faithful observation of certain moral standards as the

9. For example, changes in divorce laws may have profound effects upon the family life of married couples and their children. Such changes may also contribute to the instability of fundamental social structures. *See,* Stone, *The Public Influence of the Bar,* 48 HARV. L. REV. 1, 4-7 (1974). For a more general discussion of the law profession's obligations to society generally, *see,* MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY, 288-293 (ABF 1972).

10. The classic example of this notion is the case of Goldberg v. Kelly, 397 U.S. 254 (1970). The court found that welfare recipients were entitled to an administrative hearing before their payments could be terminated. The impact of the decision for the claimants was slight; the payments continued until after the hearing to determine eligibility was had. The effect on non-welfare recipients and implementing agencies was great; the new interim payments imposed substantial additional burdens on federal funds. *See, e.g.,* Kihss, *Mayor Assails Relief Rule,* The Wall Street Journal, Aug. 14, 1972, at 3. *See also,* Stone, *The Public Influence of the Bar, Id.*

touchstone for ensuring adequate service to each constituency.[11] Thus, malpractice tends to be defined around acts or omissions which abrogate these moral standards.

The medical profession, perhaps viewing moral standards as an ineffective vehicle for protecting the diverse constituencies affected by their profession, has been inclined to emphasize the more objective conduct standards dealing with execution and analytical skills.[12] Harm to various groups concerned with the medical profession is presumably eliminated when the profession excludes or punishes members who consistently fall below these standards of execution.

The accounting profession gives some credence to both moral and conduct standards in shaping the malpractice concept. However, the profession seems most concerned with the results derived from the application of its members' professional skills.[13] Thus, the quality of the results is preeminent and malpractice is most frequently associated with those transactions where the accountant's final work product fails to provide a clear statement of a business's financial condition.

The variance among professions regarding the essence of malpractice reflects many factors. Each conceptualization has distinctive values and persuasive theoretical bases. Unfortunately, either by design or inadvertence, each tends to result in preference for one constituency harmed by professional malpractice.[14] Thus, any critical analysis of malpractice within a profession, undertaken with the objective of reducing harm, must focus on these conceptualizations. Their evolution must be understood, the forces maintaining their contours must be mapped, and the values to be derived from changes must be carefully measured against the costs associated with bringing about such changes. The major objective for their

11. *See e.g.*, general discussion of discipline within the legal profession, MARKS & CATHCART, DISCIPLINE WITHIN THE LEGAL PROFESSION: IS IT SELF-REGULATION?, ABF PUBLICATION NO. 5 (1974) reprinted from ILLINOIS LAW FORUM NO. 2 (1974).

12. Derbyshire, *What Should the Profession Do About the Incompetent Physician?*, 194 J.A.M.A. 1287 (Dec. 1965).

13. One of the chief concerns of the accounting profession in the area of publicly owned corporations is protection of investors who depend on information accountants provide. Weisen, REGULATING TRANSACTIONS IN SECURITIES, p. 273 (1975). The particular method employed by an accountant is not as important so long as the resulting report accurately indicates the financial status of the audited company. *Accountable Accountants,* Barrons, at 9 (April 26, 1976).

14. The conceptual basis of legal malfeasance is centered on the attorney-client relationship. It focuses on the moral conduct of the attorney. *See* MARKS & CATHCART, *supra*, note 11. The strong emphasis on the conduct of the attorney tends to protect lawyers who are deficient in requisite skills because when client complaints are entered in the disciplinary process the initial screening mechanisms tend to look for a moral conduct breach and find none when the problem complained of involves inadequate performance.

reform must be to protect all four constituencies from unnecessary harm. There is some point at which the reconceptualization taken to aid one constituency will subject another to an unjustifiable increase in risk of harm from professional misconduct.[15]

3. *Detecting Malpractice*

The interests to be served and the conceptualizations employed to insure service to such interests are substantive factors central to malpractice. Additionally, two procedural factors shape the dimensions of malpractice in any profession: the methods for detecting the presence of malpractice and the procedures for dealing with cases of detected malpractice.

Does a falling tree in an uninhabited forest make a sound? The answers to this classical question of perception provide a good starting point for appreciating how the contours of malpractice are significantly controlled by the methods used to detect its presence. If formal complaints by doctors measure the full extent of medical malpractice, such malpractice is of insignificant dimension. If patient dissatisfaction is the measure of its existence, medical malpractice might be viewed as a sequel to the black plague. The method of measuring or detecting malpractice is of utmost importance. A balanced regard for the four constituencies noted earlier makes the method of detection as much a cornerstone of professional malpractice as the normative conceptualization of what is substantive evidence of malpractice.[16]

4. *Coping with Detected Malpractice*

The final factor shaping malpractice within any learned profession is the procedure for handling detected malpractice or deterring

15. A conceptualization of malpractice which emphasizes harm to the individual may be detrimental to the well being of the public interest. The converse is also true. A conceptualization which has as its focal point the social interests of the public may prove extremely harmful to the individual. If the focal point of malpractice is on harm to the profession, many emerging ideas on how to make professional services available to greater numbers of people would be jeopardized. Blatant, distasteful advertising might force a standard which does not allow any advertising. The result: client access to professional services stimulated by advertising would be inhibited or precluded. *See, e.g.*, Nathan, *Madison Avenue and the Profession: What Will the Partnership Be Like?* 4 STUDENT LAWYER No. 6 at 10 (Feb. 1976).

16. This statement is exemplified by the legal profession's approach to detecting harm done to constituencies. The system is directed at discovering harm done to individuals, either because of a moral breach or because of a performance breach. The concept is prevalent in both the traditional mechanisms designed to ferret out violations of professional ethics and in conventional litigation where poor performance is questioned. As a result constituencies other than immediate clients are ignored. A detection mechanism based on a conceptualization which considers all constituencies would most certainly cause a reconsideration of substantive notions of malpractice.

its occurrence. Contemporary social science research of the American legal system has done much to map the disparities between "law on the books and law in action."[17] In the area of legal malpractice, distinguished bar committees have recorded the disparities in all their splendor.[18] Lawyer-chaperoned suits involving medical malpractice have performed similar services to the medical profession, and insurance actuaries have translated this information into deterrence stimuli.[19] The Securities and Exchange Commission has been similarly diligent to expose very serious problems between principle and practice in the accounting profession.[20]

The pervasive presence of "untreated" malpractice, even as bounded by the professions, stems from the use of excessively narrow treatment methods in conjunction with the frugality and ineptitude associated with their employment.[21] Thus, the detrimental effects of malpractice will persist until the reasons for half-hearted use of inadequate methods are understood, and viable alternatives, sensitive to the forces inherent in the other three factors, are fashioned. Presumably, negative approaches will continue as the major response to detected malpractice, although hopefully greater use of behavioral science data may foster the development of more effective negative approaches.[22] Incipient malpractice presentes a problem more difficult of efficient solution.[23] Undoubtedly some negative

17. The LAW AND SOCIETY REVIEW is largely dedicated to publication of "gap" studies initially advocated by Roscoe Pound. A conceptual analysis of the gap may be found in Abel, *Law Books and Books About Law*, 26 STAN. L.R. 175 (1973). A fitting example for this article of such a gap is discussed in Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooperation of a Profession*, 1 LAW & SOCIETY REVIEW 15 (1967).

18. *See* ABA SPECIAL COMMITTEE REPORT ON EVALUATION OF DISCIPLINARY ENFORCEMENT—PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, FINAL DRAFT (1970) [Clark Committee Report]. *See also*, MARKS & CATHCART, *supra* note 11.

19. *See*, Sheehan, *supra* note 1.

20. *See, e.g., Laventhol, Kerstein, Horwath*, Accounting Series Release and *Touche Ross & Company*, Accounting Series Release, *supra* note 3.

21. *See*, Clark Committee Report, *supra*, note 18, and MARKS & CATHCART, *supra* note 11. *See also*, Andres, *Revising Lawyer Grievance Procedures Asked in Report to the New York City Bar*, The Wall Street Journal, Feb. 4, 1976 at 7.

22. Through a more sophisticated use of behavioral science data, classifications of professional conduct or performance deviants could be established. Based on predetermined information, one coming within the established classes would either be dealt with by a grievance committee, ostracized in some other fashion, or subjected to some other disciplinary procedure. In this way corrective efforts could be directed at those who would most benefit by it while ignoring those who would, for the most part, not respond to more effective negative approaches than those now used.

23. For example, the United States Supreme Court decisions in Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972) recognized the right of criminal defendant to have an attorney whenever the possibility of incarceration existed. Before the extensive use of Public Defender offices, members of the bar were appointed to represent indigent defendants on a rotational basis. How the attorneys chosen to represent a criminal defendant were selected could have greatly influenced the incidence of malpractice. An attorney practicing Securities law would in all likelihood be ill-prepared and ill-equipped

approaches may be of value, but it is one of the basic theses of this article that positive approaches such as incentive programs, sensitivity training, and other forms of education will provide the most effective weapons against this most serious problem.

The internal substantive skills and the socioeconomic purposes of the learned professions differ greatly. The relative importance of the four constituencies concerned with professional activity and the conceptual focus each profession employs for combating malpractice are dissimilar. Conversely, the professions are remarkably similar with respect to methods for detecting and treating malpractice, if one ignores differences in the rigor of their application. These patterns of diversity and congruency among professions are not a major point of concern in this article other than to elucidate the range of matters that professions have considered with regard to malpractice. However, the detailed study of these patterns of diversity and congruency would be fruitful. The findings would be extremely useful in assessing the wisdom of replicating successful activities of one profession in dealing with the malpractice problems of another profession.

III. Malpractice—What causes it?

A. *Disagreement about Sources*

Comprehensive treatment of the malpractice problem in any profession must be founded upon an understanding of the short- and long-term forces that stimulate it. It has been common for profession-members to style malpractice as a random occurrence among a small number of professionals, which is a general risk of doing business.[24] However, the escalating costs of malpractice to the whole profession or sub-classes within it, have prompted more sophisticated analysis aimed at identifying geographic and functional areas of practice having disparate rates of identified malpractice. Once these areas are identified, studies may be undertaken to determine the dominant causes which may include: the complexity of skills applied, the personalities of clients making use of those skills, and the personality characteristics of the professionals prac-

to defend a person accused of a capital crime. How to be selective among attorneys without being so selective as to overburden those found acceptable is an exercise in avoiding malpractice at an incipient stage. For more extensive analysis of malpractice potential inherent in a legal system concerned with criminal defense work, *see* Blumberg, *supra* note 17.

24. Professionals have a tendency to characterize malpractice as being the result of the conduct or performance of a "few bad apples," and not a problem which must be carefully analyzed and avoided by the majority. *See, e.g.*, Johnson & Hood, "The Lawyers of Montana" (a series of articles about the legal profession in Montana, reprinted in pamphlet form from the Missoulian) at 3 (1974); Wallach, *Medical Malpractice: A Professional Dilemma for the Lawyer*, 2 J. of L. Med. 40 (July/Aug., 1974).

ticing those skills. Both quantitative and qualitative information regarding cause is needed to treat the malpractice problem effectively with the limited resources normally available. Unfortunately, no profession has undertaken such a systemic analysis to any significant degree. The professions have a tendency to fiddle with those system parts which are easiest to access and manipulate without disturbing vested interests. The results are most often cosmetic; long-term solutions are seldom produced.

Although some determinants of malpractice rest outside the professions involved, many stimuli reside within the profession. Three important classes of stimuli for malpractice may be found in each profession: (1) those arising from personal limitations of the individual profession-members; (2) those primarily involving inadequacies in the teaching and training functions associated with the profession; (3) and those arising from the profession's fundamental structures, molded by the forces of historical evolution and by close associations with non-professional institutions over long periods of time.

B. Individual Limitations of Members

Within the realm of personal limitations, one can order stimuli according to notions of time or durability, which can in turn be translated into magnitude of impact. First, there is malpractice associated with overcharging for services rendered or unauthorized commingling of client assets for the personal benefit of the profession member.[25] Many of these instances of malpractice can be traced to temporary lapses in personal judgment, triggered by financial pressures on the professional, or the temptation to make a one-shot financial killing, or both. If such weaknesses or temptation afflict an individual on a recurrent basis, personal moral weakness rather than external misfortune or temptation should be assigned as the cause. Personal moral weakness presents a more serious and long-term problem for the profession. If a professional cannot discern lines of propriety, he can easily involve himself directly, and the profession indirectly, in the realm of bribes and other corruptions of power. Equally important, but seldom appreciated, is the moral weakness that makes profession-members insensitive to the need for transcending the narrow behavioral norms inherent in a parochial society.[26] Such transgressions of existing norms may be required to

25. *See,* Disciplinary Rules 2-106 and 9-102, ABA Code of Professional Responsibility (1972); *but see,* Blumberg, *supra* note 17 at 24-28.

26. At times it is necessary to ignore "legalized" behavioral norms in order to positively direct the development of society. *See, e.g.*, FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE. *See also,* FELIX FRANKFURTER REMINISCES (Dr. A. Phillips, Ed. 1960) at 239-256.

foster fundamental human and institutional principles deemed essential for society's positive evolution. This type of moral weakness is likely to have a longer-term effect than personal financial crisis as a stimulus for malpractice. It is theoretically possible to deal with the problems of moral weakness during a member's lifetime in order to eliminate or substantially reduce its significance, but the cost to the profession of such an undertaking would be prohibitive.

Intellectual or skill limitations are perhaps the most serious of the personal limitation stimuli. Some areas of professional activity are extremely complex and require a high level of intellect and finely-honed skills for the individual to function at an acceptable level.[27] If a profession-member does not have the requisite intellect or skill when entering this type of professional practice, and fails to associate himself with individuals having such qualities, the result can only be a persistent pattern of malpractice. Little can be done to rectify this problem other than to have the individual professional permanently vacate the practice area.

A related long-term problem concerning personal, intellectual, or skill limitations results from individuals' inability to jettison fundamental skills or methods of analysis central to their practice for many years. This problem is perhaps most evident in the medical field. Older, busy practitioners often cannot maintain their level of practice and simultaneously acquire all the new medical data needed to support application of new and obviously superior techniques. This third type of personal limitation occurs in areas where there are rapid changes in approaches requiring considerable cost in terms of an individual's time.[28] In such situations, only those newly trained will be in a position to handle the entry costs. Thus, those areas of a profession which are undergoing rapid change will need to be dominated by the younger professionals if the incidence of malpractice, especially if measured by results, is to be reduced.

C. *Limitations of Education and Training for Whole Profession*

Educational and training institutions are normally a profession's strongest bulwark against the intellectual and skill limitations of members. Institutional activities are the major vehicles for individuals to attain specific professional skills. Unfortunately, if deficient they can also breed malpractice affecting large segments

27. Among the plethora of ready examples are brain surgery, antitrust litigation, multiparty air crash litigation, and preparation of consolidated income statements of multinational companies.

28. Examples of such areas include cancer treatment, cardiac care, intensive care units for newborns and such diverse areas of the law as pension planning and criminal procedure.

of the profession. Such negative influence on the quality of practice is long term.

Professional schools are being subjected to increasing control by professions as a whole, both as to numbers being processed[29] and subjects being covered.[30] Curriculum structure naturally tends to emphasize interests of particular constituencies now served.[31] Consequently, professional conduct relating to other constituencies is often neglected. Such neglect may be viewed by ignored constituencies as bordering on malpractice.

Apart from the emphasis upon the particular interests that may be inherent in the curriculum, schools may adopt instructional approaches to professional responsibilities, which are narrower than that role explicitly or implicitly assigned to the profession by various levels of government and society.[32] If malpractice is viewed as a less-than-adequate fulfillment of the assigned role, graduates will likely fall short of expected standards of performance unless some corrective force is applied after graduation. Unfortunately, such "built-in" inadequacy tends to endure for generations of professionals.

Since professional schools cannot adequately provide students with necessary experience, on-the-job supervision associated with a particular profession substantially influences the incidence of malpractice. This follows because professional service is the product of both raw knowledge and experience concerning proper application of that knowledge. In professions where practice is normally done in larger firms or clinics embodying both experienced and inexperienced professionals, it is possible to ensure that most professional tasks are handled by individuals possessing the appropriate blend of both knowledge and experience. However, without group practice, or if group practice is developed solely to achieve economies in administrative services rather than to permit specialization, quality control resulting from experience will be minimal. The likely result is a higher incidence of malpractice, especially where experience is

29. *See, e.g.*, Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968).

30. The judiciary, as an element of the legal profession, is attempting to exert control over law school curricula. Pedrick & Frank, *We Are Faced With A Clear and Present Danger*, LEARNING AND THE LAW (Winter 1976); Cutright, Cutright, and Boshkoff, *Course Selection, Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience*, 27 J. LEG. ED. 127 (1975); further discussion of Indiana's Rule 13 is provided in Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEG. ED. 449 (1974).

31. Consumer advocate Ralph Nader, among others, asserts that law school curricula emphasize business interests excessively. Nader, *Ralph Nader Asks Law Students to Change*, 24 Harv. L. S. Bull. 32 (April, 1973); *See also*, Thaler, *What is Left of You After Law School*, 4 STUDENT LAWYER No. 7 at pp. 14-15 (Mar. 1976).

32. M. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM (1975); Thaler, *Id.*

critical to satisfactory performance of the assigned role.[33] When this experience acquisition function is inadequately carried out through group practice, the stimulus to malpractice will be as long term as that of the educational institutions.

Continuing professional education can serve as a powerful tool to minimize the initial shortcomings of professional education as well as inadequate on-the-job supervision or experience acquisition. Its potential for combating problems of malpractice is great when mandatory continuing professional education is a requisite for maintaining professional standing.[34] However, this educational opportunity is frequently imbued with the same limitations inherent in the original professional education. Consequently it may become a long-term stimulus for malpractice itself, especially in areas where an important dimension of professional practice transcends the application of narrow technical skills.

D. Limitations of the Profession's Structure

Perhaps the longest term stimulus for professional malpractice flows from the profession's general structure. It has been argued that an important element of the professional structure is the division of the economic market so that the more lucrative areas of professional practice are reserved for those having control over the profession's general structure.[35] In essence, power derived from the structure is used to maintain intra-professional divisions for the benefit of select members rather than to ensure client protection. There is evidence concerning many professions that the professional structure is also used to foster a conspiracy of silence among members to minimize the identification and treatment of individual incidents of malpractice.[36] To the extent the structure does foster this conspiracy of

33. For the neophyte lawyer the necessity of experience is manifest in areas such as drafting complex trust instruments involving the assimilation of materials from the Internal Revenue Code, state statutes and case law. In the medical field the necessity of experience bears a direct relationship to the number of years of residency for board certification. An interesting parallel is that those areas of medical practice which ostensibly rest on experience are usually the areas with the highest insurance premiums for malpractice coverage.

34. Parker, *supra*, note 3.

35. *See* , Akers, *The Professional Association and the Legal Regulation of Practice*, 3 LAW & SOC. REV. 463, 477 (1968); Shuchman, *supra*, note 29; *see also*, Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513, 523 (1970).

36. Physicians and surgeons as a group have the reputation of being participants in a "conspiracy of silence." Note, *The Montana Plan for Screening Medical Malpractice Claims*, 36 MONT. L. REV. 321, 325 (1975); Markus, *Conspiracy of Silence*, 14 CLEVELAND-MARSHALL L. REV. 520 (1965). In California, suit was brought against a group of doctors for conspiracy to obstruct the ends of justice by their refusal to testify in a malpractice action. *Agnew v. Parks*, 172 Cal. App.2d 746, 343 P.2d 118 (1959). *See also*, Note, *The California Malpractice Controversy*, 9 STAN. L. REV. 731 (1957).

silence, it is a powerful stimulus for malpractice.

Professional structure also precludes formal involvement of lay persons concerning assessment of the short- and long-term adequacy of professional services for the four constituencies. Consequently, malpractice tends to be narrowly conceived and often ignores responsibility to serve presently neglected constituencies. Further, pressures are absent for reconceptualization of service obligations, which would prompt development of methods and resources necessary to preclude inadequate professional representation of neglected constituencies.[37]

Finally, if a profession underfunds tasks assigned to it, and yet insists on a supervisory monopoly of those functions, there is a high probability the structure will have the effect of limiting the adequate flow of resources for detecting and coping with individual and systemic malpractice.[38] If this occurs over long periods, there will be efforts to deal with the malpractice problem, at least insofar as individuals are involved, through malpractice suits or insurance where case disposition is not dominated by the injuring profession. Obviously, there exists an abundance of other opportunities for use of the professional structure as a force of good or evil regarding malpractice. Professional structure must be a critical focus when dealing with malpractice because of its long-term effect and the serious impact on short-term problems.

IV. Malpractice—Current Approaches of Professions

A. Overview

Many activities of learned professions have a prophylactic effect on the scope and impact of malpractice: some preclude its occurrence, others retard the frequency of its presence, and still others limit the severity of its harm and punish those responsible. These activities may also serve to: (1) maintain boundaries between the profession and others; (2) divide markets among profession members; or (3) facilitate profession competence to handle new problems or deal more effectively with existing problem classes.

Some evidence indicates that attorneys are losing their reluctance to "commit fratricide." Sandler, *A Shopper's Guide to Professional Liability Insurance,* Legal Economics, (Fall 1975).

37. In Montana a screening panel is used to assess the merit of malpractice claims. If the panel of doctors and lawyers determines a claim is meritorious, expert testimony is readily available. *See,* Note, *The Montana Plan for Screening Medical Malpractice Claims, Id.*

38. The Clark Committee found that legal disciplinary committees were underfunded and understaffed. A related criticism was that the committees did not undertake continuing investigations of particular problem areas. *Supra* note 18. *See also, Revising Lawyer Grievance Procedures Asked in Report to the New York City Bar, supra* note 21.

Some activities have a long and venerable history while others are inventions of contemporary times. Though all activities seek to deal directly or indirectly with the malpractice problem, they dwell almost exclusively on limitations of individual members. Consequently, focus is on rather short-term causes of malpractice. In recent years dialogue has increased concerning inadequacies of education and training, but dissension characterizes discussions of remedies.[39] Some remedies will produce short-term improvement, but patently overlook the professions' long-term responsibilities to nurture innovation that will allow better service to all four constituencies.

Methods now employed by the learned professions to eliminate incompetent practitioners or motivate them to acquire needed knowledge and skills center on (1) peer review, (2) self-assessment testing, (3) continuing professional education on a mandatory or voluntary basis, (4) specialization, (5) license board testing, and (6) disciplinary organizations within the profession. Several methods are utilized to some extent by all professions. Others seem viable to only one, because of peculiarities in relationships between the profession, its constituencies, and subject matter concerned. The emphasis accorded various methods by each profession is different and seems to reflect the scope and intensity of its past and current malpractice problems. Outlined below are the methods each learned profession relies upon to maintain the quality and utility of its services. Although summary only, the descriptions disclose variations in emphasis among professions accorded each method. These variations indirectly reflect their divergent concern for conduct, performance, and morality.

B. Doctors - Focus on Skills and Methods

1. *Peer review,* both informal and formal, is a fundamental deterrent to malpractice.[40] With increasing frequency, doctors are practicing in groups through clinics and specialty offices. Within this context associates are chosen and at times asked to leave, after assessment of their previous and current performance. Although such decisions are not taken lightly, they normally are not imbued with great formality. In contrast, formality is highly evident in hospitals where various committees evaluate physician performance

39. *See,* Mayhew, CHANGING PRACTICES IN EDUCATION FOR THE PROFESSIONS, and Allen, *The Causes of Popular Dissatisfaction with Legal Education, supra* note 5.

40. Peer review is an effective deterrent to malpractice from within the profession rather than from without. A physician ostracized by his peers is likely to be followed by the reputation initially developed which occasioned his dismissal and other doctors are not likely to accord privileges or referrals to one with a poor peer appraisal.

involving hospital facilities. Several levels of supervision exist, with physician experience and expertise tending to correlate with freedom from supervision. However, if the quality of a physician's performance deteriorates, he may be subjected to close supervision without being totally ousted from the staff.[41]

Other forces fostering peer review within hospitals are the detailed guidelines promulgated by the Joint Commission on Accreditation of Hospitals.[42] These guidelines require hospitals to establish "essential qualifications" each individual must possess to practice in the hospital and to establish regulatory meetings of specialty groups to analyze medical work performed. Despite the guidelines and their extended application in theory, their real import is muted by the fact most hospital staff efforts are directed at ensuring efficient use of facilities rather than evaluating individual physician performance.[43]

Recent embellishments of peer review are the Professional Standards Review Organizations (PSRO) mandated by the Social Security Act.[44] As a condition precedent to government reimbursement for services under Medicare, Medicaid, and other plans, Congress requires evidence of the necessity and quality of medical services rendered. PSRO's composed of local doctors[45] certify compliance with Congressional requirements to the funding sources. Membership on the PSRO's is rotated frequently to facilitate diversity and broad awareness of PSRO standards.[46] Supervisory panels formed at the state and national levels unify the standards established by the local PSRO's.[47] Presumably as general awareness of the standards develops, doctors will evaluate their own performance against such standards.

2. *Self-assessment,* apart from peer review, is now institutionalized by nearly a third of the national medical specialty societies to foster professional consciousness raising.[48] Members take various multiple choice and other types of tests covering skills and methods. The tests are graded by the specialty societies or the individual.

41. Derbyshire, *What Should the Profession Do about the Incompetent Physician, supra* note 12; Talkington, *Hospital Medical Staff Law and By-Laws,* 14 WASHBURN L. J. 443 (1975); Parker, *supra* note 3; Trout, *Should the States Act on the Malpractice Problem?,* 1 J. OF L. MED. 32 (NOV./DEC. 1973).

42. *See,* Talkington, *supra* note at 446 for a compendium of the JCAH guidelines.

43. Parker, *supra* note 3, at 468.

44. 42 U.S.C. § 1320c. *See* Parker, *supra* note 3, at 468 for an excellent discussion of PSRO's.

45. 42 U.S.C. §1320c-1(b).

46. 42 U.S.C. §1320c-4(d).

47. 42 U.S.C. §1320c-5(a).

48. Note, *Medical Education in the United States, 1972-73,* 226 J.A.M.A. 893, 956 (1973). *See, also,* Parker, *supra* note 3.

Physician response to some programs has been excellent. The programs facilitate physician awareness of performance standards and allow evaluation of individual competence regarding such standards without risk of embarrassment.

3. *Continuing education* is a hallmark of the medical profession, and some is mandatory.[49] For example, the Oregon State Medical Society requires members to complete 150 hours of instruction every three years. Doctors' involvement in this program has been extremely high, even though society membership is optional to licensing, because such membership is a requisite to use of many Oregon hospital facilities.[50] Three states authorize their boards of medical examiners to require continuing education as a prerequisite to certification,[51] and it seems likely this number will grow.

Voluntary continuing education programs sponsored by major medical organizations have been available to most doctors for many decades. The range of subjects covered and presentational formats is enormous as has been the doctors' response. Since 1968, the American Medical Association has even offered a Physician Recognition Award to all doctors completing 150 hours of instruction within a three-year period.[52] By 1973, 40,585 doctors had qualified for the award.[53]

4. *Specialization* has long been employed by the medical profession to improve members' skills in narrow, complex fields. In theory, specialization permits doctors to increase the depth of their technical knowledge and to utilize highly refined, expensive equipment. Specialized services are applied to community medical needs through clinics seeking to insure medical coverage across the full range of possible body malfunctions. Unfortunately, specialization in practice has not achieved all its theoretical benefits. Flaws in concept implementation tend to increase medical service costs and stimulate malpractice claims. The reasons for such unwanted results are many, but two are particularly pertinent to this article. Often efforts to specialize fail to recognize that medicine is not solely the application of special professional skills. Correct diagnosis of many patient maladies rests heavily on self-reporting. Patient

49. *See, e.g.*, Dornell, *Ohio Strives to Solve the Medical Malpractice Problem*, 4 J. OF L. MED. D30 (Jan. 1976). *See also*, Parker, *supra* note 3, at 482.

50. Parker, *supra* note 3, at 446. *See also*, Libby, Weinswig & Kirk, *Help Stamp Out Mandatory Continuing Education!*, 233 J.A.M.A. 797 (Aug. 1975).

51. The states are New Mexico, §67-5-3(E), NEW MEX. STATS. (1953); Maryland, Art. 43 §121(2), ANN. CODE OF MD. (1957); and Kansas, §65-2809, KAN. STAT. ANN. (1972).

52. Note, *Medical Education in the United States, 1969-70*, 214 J.A.M.A. 1487 (1970).

53. Parker, *supra* note 3, at 483. *See also*, Sherrer & Sherrer, *The Lawyer's Recognition Award: A Suggested Program for Upgrading and Structuring Continuing Legal Education*, 32 FED. B. J. 26 (1973).

disclosures are stimulated in no small way by the patient's feeling of trust in the doctor.[54] However, in contrast with a family physician's patient relationship, many specialist-patient relationships do not foster this trust. These relationships may also fail to motivate optimal patient acceptance of prescribed treatment, a critical aspect of successful recovery in many situations. These factors, all important to successful medical care, are not fully compatible with the concept of specialization. Execution of the concept to date, especially in urban areas, has done much to emphasize these elements of incompatibility.

5. *Licensing boards,* normally composed exclusively of medical doctors, among other things, seek to deny entry to individuals not possessing skill and method competence.[55] Their authority to limit entrance, as well as expel, derives from the state police power. Although their inherent power is extensive, the screening techniques employed in the licensing are crude in comparison with the physicians' range of responsibilities, and such boards seldom mandate expulsion.[56] Only fifteen states, as of 1974, identified professional incompetence as a ground for disciplinary action;[57] Montana's law permits license suspension for gross malpractice, negligent practice or professional misconduct.[58] Despite pervasive authority, history provides little evidence that licensing boards deal aggressively with profession inadequacy after admission. Even admission screening, in light of the criteria employed, can seldom do more than ensure that members initially possess knowledge of textual skills and methods.

6. *Grievance committees* of state and local medical societies ostensibly undertake investigations of incompetent member action upon the complaint of a patient or colleague, and act to preclude recurrences of such substandard conduct. Their proximity to the parties harmed and the *situs* of the harmful conduct should make such committees a most vital deterrent to malpractice, but the record suggests otherwise.[59] Frequently, such disciplinary organiza-

54. Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship,* 79 YALE L.J. 1533 (1970); Breckler, Price & Shore, *Informed Consent: A New Majority Position,* 1 J. OF L. MED. 13 (July/Aug. 1973).

55. Licensing in Montana follows this general pattern. *See* Revised Codes of Montana (1947) [hereinafter cited as R.C.M. 1947], §82A-1602.2 (Accountants); R.C.M. 1947, §82A-1602.15 (Doctors); and R.C.M. 1947, §93-2013 (Attorneys). Montana is somewhat unique in that under the court's interpretation of the Montana Constitution the legislature has no authority to regulate the licensing of attorneys. In Re Senate Bill 630, 164 Mont. 366, 532 P.2d 484 (1974).

56. Derbyshire, *Medical Ethics and Discipline, supra* note 3.

57. *Id.*

58. R.C.M. 1947, §66-1037.

59. Derbyshire, *Medical Ethics and Discipline, supra* note 3.

tions lack the manpower needed for effective supervision. The reluctance of doctors to report suspected misconduct of colleagues, when added to such manpower limitations, makes comprehensive internal discipline an elusive goal. The value of this deterrent is further limited by the fact that doctors may continue to practice even after expulsion.[60] Only when state medical society membership is a requisite for the use of hospital facilities can discipline by expulsion have substantial deterrent value. These impediments have prompted skepticism about internal disciplinary effectiveness even among profession members. One physician, writing in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION concludes: "Does organized medicine adequately discipline unethical physicians? The answer is no."[61]

C. *CPA's—Focus on Results and Methods*

An accountant's impact on his client is obviously not as personal as a doctor's impact on his patient. However, an accountant's individual work product frequently affects many individuals other than those commissioning the work. Many day-to-day dealings of modern commerce rest on the assumption that his work product accurately reflects financial reality. The reliance of government officials and other individuals on the work executed by accountants on behalf of single clients necessitates employment of dependable methods for ensuring quality control. Although the accounting profession uses fewer mechanisms than other professions for maintaining acceptable levels of performance by its members, those utilized are quite effective.

1. *Peer review* in the accounting profession does not have a long history, but is rapidly becoming vital for the profession's deterrence of substandard performance. In 1974 the American Institute of Certified Public Accountants adopted a plan providing for panels of accountants to review work products and procedures of other accounting firms.[62] Panel reports are submitted only to the firm being examined and current procedures do not provide for follow-up corrective action to insure compliance with professional standards.[63]

In addition to internal peer review implemented on a voluntary

60. Doctors are not required to maintain membership in a medical society to practice medicine in Montana. R.C.M. 1947, §66-1025.

61. Derbyshire, *Medical Ethics and Discipline, supra* note 3, at 60.

62. Mims & Hutchins, *Accounting—A Review to Make the Audit Credible*, Bus. Week, June 22, 1974 at 84.

63. Boyle & Holton, *Peer Review in the Accounting Profession—Who Audits the Auditor?*, 45 C.P.A.J. 15 (Jan. 1975). *See also*, Mims & Hutchins, *supra* note 62.

basis, the systemic importance of accountants' work products has prompted outside entities to stimulate in various ways the concept of peer review. The Securities and Exchange Commission periodically has occasion to discipline CPA firms whose performance falls below SEC standards.[64] Firms so disciplined have been required to submit to review by other CPA firms.[65] The SEC's aggressive posture concerning accounting standards is understandable in light of the key role accounting plays in making SEC disclosure principles a meaningful form of protection for the public. There are some parallels with the medical profession's PSRO procedures,[66] but clearly the SEC is more interested in the integrity of results than the propriety of certain methods and procedures in specific cases, a concept central to the PSRO system.

2. *Continuing education,* although a vigorous activity within the accounting profession, can hardly be viewed as a primary deterrent to substandard professional performance. However, it has achieved some prominence as a formal deterrent when contrasted with other professions. Fourteen states have some continuing education requirement for accountants.[67] In another twelve states, either the State Board of Accountancy or the State Accounting Society is on record as supporting mandatory continuing education,[68] while another several states promote voluntary continuing education programs.

3. *Licensing* is an integral part of the profession's activities for insuring maintenance of professional standards. Such licensing, derived from the state police power, focuses on minimum educational requirements and satisfactory performance on a five-part national examination.[69] Because of the relative objectivity of the skills and results associated with the profession in contrast with law and medicine, these licensing procedures are an extremely vital instrument for ensuring minimum professional competence. In most states, profession members are subject to discipline by the state licensing board should they be involved in dishonesty, fraud, gross

64. 17 C.F.R. §20.2e (1975); *See, Laventhol, Kerstein, Horwath & Horwath, supra* note 3; *Touche Ross & Company, supra* note 3; and *In the Matter of Laux, Gose & Co.*, Accounting Series Release No. 160 (Aug. 27, 1974), CCH FED. SEC. L. REP. ¶¶ 72, 182.

65. *See, e.g., In the Matter of Benjamin Botwinick & Co.*, Accounting Series Release No. 168, Exchange Act. Release No. 11176 (Jan. 13, 1975), CCH FED. SEC. L. REP. ¶ 72, 190.

66. *Id.*

67. Parker, *supra* note 3, at 478.

68. *Id.*

69. The C.P.A. examination is given nationwide on the same day at approximately the same hour to all persons taking the exam. In Montana certification as a certified public accountant is available to any person meeting the requirements set forth in R.C.M. 1947, §66-1819.

negligence, or a violation of the rules of the state board.[70]

4. *Internal disciplinary activities* of the accounting profession are vital, primarily due to the demands of external interests highly dependent on the accountants' performance. The profession's ethical standards, particularly its concepts of independence and reporting techniques, are matters of great concern to the profession, largely due to the influence of the Securities and Exchange Commission.[71] The SEC wants the investing public to gain accurate financial information concerning companies whose stock is traded publicly. Thus, the profession is encouraged to ensure member observance of uniform procedures for reporting essential to facilitate public comparison of various investment opportunities. Further, the profession is diligent in its insistence that members maintain independence from clients to facilitate faithful application of these uniform procedures. Normally, the American Institute of Certified Public Accountants establishes the uniform standards for reporting and serves as the clearinghouse for establishing principles that ensure independence of profession members from client interests. The impact of these standards on profession members is especially high in comparison with that associated with the medical and legal professions. This is primarily the consequence of the ease with which performance of profession members can be measured against defined standards.

D. Lawyers—Focus on Conduct

1. *Competence measurement and maintenance* activities of the legal profession are best characterized as complex and confusing when compared with the medical and accounting professions. The diverse roles of lawyers have made standards for competency measurement elusive. Attorneys concerned with the many facets of taxation or title searches employ specific skills and methods analogous to the routines of the medical and accounting professions. However, lawyers also serve at times as analytical generalists. In this capacity they fashion strategies for client action on the basis of cumulative judgment derived from diverse experiences; strategies that blend many seemingly unrelated skills and methods. The harms caused by lawyer malpractice, like the diverse roles of lawyers, are devoid of the distinctive patterns frequently associated with other learned professions. Some legal misfeasance resembles medical malpractice

70. *See, e.g.*, R.C.M. 1947, §66-1834.

71. MEIGS, LARSEN & MEIGS, PRINCIPLES OF AUDITING (5th ed. 1973). *See also*, Code of Professional Ethics, American Institute of Certified Public Accountants (1972); *also, Accountable Accountants, supra* note 13.

by producing severe personal harm such as imprisonment, loss of child custody or significant financial liability. Other types of attorney misjudgment can result in errant government or corporate activities harmful to many thousands of people and entities over long periods of time.

Diffusion of roles and attendant potential harms are paralleled by dissimilarities among member skills, styles, substantive interests, and operating philosophies.[72] While doctors and accountants within their respective professions have many common experiences of substance and procedure, lawyers enjoy few points of communal feeling. Courts and judges are the only dominant common reference points. Ironically, in many jurisdictions a significant number of lawyers have little contact with judges of courts at any level.[73]

Despite these differences within the profession concerning the techniques and skills employed, interests served, and resultant harms of malpractice, the public expects the profession to respond to societal needs as a somewhat unified group. Legal incompetence of all varieties is expected to be resolved with singular cures implemented by the profession's most visible representatives, bar associations. For reasons not easily discerned, the profession has resorted to standards that center mainly on the morality of conduct, including the ethics of diligence, rather than on satisfactory execution of fundamental skills or minimal standards of performance and result.

2. *Peer review* within the legal profession has not developed as a meaningful stimulant of competence or a deterrent of malpractice. Legal practice is dominated by sole practitioners and small partnerships.[74] Since contact among peers occurs mainly within an adversarial context in and out of courts, little objective evaluation of performance or result occurs. Even in firms involving a number of lawyers, specialization tends to retard internal review because of the absence of overlapping expertise. When specialization is absent in firms numbering over five, the essentials of review are often missing because partners tend to operate independently on matters of substance.

Only in large firms is peer review likely to be a vital mechanism for ensuring competence. Consistent substandard performance by a firm member jeopardizes the firm's interests directly and indirectly, and is thus likely to prompt other members to insist on the errant member's departure. In firms where the workload of partners and associates is highly interdependent, inadequacy will be most

72. For an excellent discussion of this matter, *see,* Cohen, *Confronting Myth in the American Legal Profession, supra* note 35.

73. *Id.*

74. *Id.*

promptly discovered and corrective action taken.

Referrals among lawyers, even those engaged in small firms, are other mechanisms permitting peer review on an informal basis. Normally, competent lawyers would not refer to substandard practitioners.[75] However, the number of referrals made within a given community is not likely to be large enough to make loss of referrals a significant deterrent to incompetence.

Legal lists are another nebulous exercise in peer review.[76] Martindale-Hubbell secures opinions from attorneys and judges, who have had contact with the attorney being rated. However, these inquiries are not directly concerned with competence. Published ratings dwell mainly on the length of an attorney's practice, his promptness in paying bills, his financial worth, and "other relevant considerations" that do not directly reflect competence.[77] The ratings favor established practitioners and embody little objective evaluation of professional skill and performance. Although the Martindale-Hubbell rating can be important to a lawyer's practice, the publisher will not reveal sufficient information to evaluate the accuracy of the ratings.[78] Such a policy is hardly consistent with a system of meaningful peer review.

3. *Continuing legal education (CLE)* has long been used to maintain member awarness of recent substantive developments in specific fields.[79] The popularity of voluntary courses has increased substantially in the last decade because of rapid expansion in the areas of the law involving consumer protection, and major upheavals in established fields such as commercial transactions, probate, family law, and land use planning.[80] Many of these courses center around dialogue. In recent years written materials have also been

75. In New Jersey the question did arise when an attorney transferred a client's personal injury case to an out-of-state attorney. The client was subsequently subjected to harm by the out-of-state attorney's criminal misconduct. The referring attorney was not found to be negligent even though he did not inquire into the out-of-state attorney's reputation for honesty because the referring attorney had verified the out-of-state attorney was a licensed practitioner. *Tormo v. Yormark*, 398 F.Supp. 1159 (D.N.J. 1975). *See also, Avoiding Malpractice*, 4 STUDENT LAWYER No. 7 at 20 (Mar. 1976).

76. *See, e.g.*, Comment, *Legal Ability Ratings and the Fair Credit Reporting Act*, 61 KENTUCKY L. J. 1034 (1973).

77. See inside cover of MARTINDALE HUBBELL LAW DIRECTORY (1975).

78. *See*, Comment, *supra* note 76, at 1038.

79. Note, *Continuing Legal Education: A Significant Trend for the Kansas Legal Profession*, 14 WASHBURN L. J. 450 (1975).

80. As examples of the extensive nature of CLE, *see* ALI-ABA CLE REVIEW, Vol. 7 No. 14, April 2, 1976 (Cosponsored by the University of Wisconsin, dealing with "Uniform Commercial Code" and "Estate Planning In Depth"), and ALI-ABA CLE REVIEW, Vol. 7 No. 22, May 28, 1976 (Sited at The University of Colorado, covering "Environmental Litigation" and "Modern Real Estate Transactions"). The ALI-ABA CLE REVIEW is published weekly by the American Law Institute-American Bar Association Committee on Continuing Professional Education.

an integral part of the activity and provide practitioners with "take-home" access to new developments.[81]

The location of these courses varies. Some are tendered in resort settings to ensure higher levels of attendance, though perhaps lower levels of attention. Others are offered in the practitioners' own environment on afternoons, during long lunches, or over weekends. In the past, local bar associations have been the dominant organizers of short, simple programs. However, CLE has tended to become more sophisticated as law schools in some states have undertaken, on behalf of the bar, to develop and sponsor such activities.[82] As the presentations have become more sophisticated, a number of commercial organizations have become involved, with a consequent advancement in instructional techniques, and an improved focus on lawyering skills.

The advent of video and electronic data retrieval technology also has done much to stimulate this emphasis on both old and new skills.[83] The results of this activity can only be an improved level of competence in traditional skills. Moreover, the new technological skills may soon be essential for competence in the many fields where the laws and regulations have become extremely complex, so complex as to defy comprehension without the aid of sophisticated retrieval techniques.

Unfortunately, most of these voluntary activities have the effect of increasing the competence of some members, but provide little systematic aid for deterring incompetence or raising the minimum threshold of competence. Ironically, few of the voluntary activities deal with notions of "conduct morality"—presently the basic standards for measuring the need to exclude members from practice.

Improving the threshold of competence has recently become a

81. *See*, California Continuing Education of the Bar, CEB CATALOG, (State Bar of California, Spring 1976). The catalog lists the myriad of books, supplements, and tapes available to members of the California Bar on continuing education. "A typical CEB Book presents the steps normally followed in a transaction (such as a sale of real property) in the chronological order encountered in practice. It contains applicable forms or other documents, separated into paragraphs, followed by explanatory comments. These comments summarize the relevant legal authorities and alert the lawyer to any practical problems raised by the use of the forms." CEB CATALOG at 5.

82. Wisconsin, Alabama, South Carolina, and Oklahoma have Law Centers responsible for CLE in the respective states. *See also*, Mayhew, CHANGING PRACTICES IN EDUCATION FOR THE PROFESSIONS, *supra* note 5, at 63-65.

83. *See*, Miller, *The Effects of Videotape Testimony in Jury Trials*, B.Y.U.L. REV. 331, (No. 2 1975); Williams *Juror Perceptions of Trial Testimony as a Function of the Method of Presentation*, B.Y.U.L. REV. 375 (No. 2 1975); Short, *An Assessment of Videotape in the Criminal Courts*, B.Y.U.L. REV. 423 (No. 2 1975); Bermant, *Critique—Data In Search of Theory In Search of Policy: Behavioral Response to Videotape in the Courtroom*, B.Y.U.L. REV. 467 (No. 2 1975).

point of major concern to many profession leaders. This has resulted in some states, like Minnesota and Iowa, imposing mandatory continuing legal education requirements on all those practicing within the state.[84] In addition, the Kansas Bar has formally asked its state supreme court to approve the imposition of mandatory continuing legal education requirements.[85]

The Minnesota approach may well become the model for many other states, since ostensibly it attempts to deal with publicly recognized problems while not imposing onerous obligations on members. Under the plan the supreme court appoints an educational board of thirteen members, some of whom may be non-lawyers.[86] This board has the power to (1) approve or disapprove CLE courses; (2) excuse individual profession members from compliance with mandatory requirements; (3) oversee methods for proving attendance; (4) make particular CLE courses required as part of the mandatory programs; and (5) report to the supreme court on member failure to comply with mandatory requirements. Although the program has cosmetic appeal, its capacity to deal effectively with the competence problem seems disputable, since it only requires fifteen hours of course work per year as contrasted with medical education programs requiring 150 to 200 hours per three-year period.

Mandatory CLE's, when combined with recertification programs, can ensure member exposure to important new material without expensive program administration costs.[87] However, exposure by itself does not raise competence. Motivation to learn is essential for improving the competence threshold. Normally, those at the margins of competence have the least motivation to learn and the programs have yet to deal constructively with this fact.[88] The trend to locate CLE programs at resort entertainment centers seems ill calculated to optimize the "will to learn". Specialization may also impede interest in broad-based programs needed to attack threshold incompetence,[89] because such programs waste the time of highly competent *de facto* specialists. Most important, however, is the fact that the current species of continuing legal education seem to be very inefficient in improving performance results, which are a

84. *See*, Byron, *Mandatory Continuing Legal Education in Minnesota*, 54 MICH. S.B.J. 361 (June 1975); Supreme Court of Iowa, Resolution of Feb. 13, 1974; *see also*, *supra* note 79 at 456.

85. *See*, Note, *Continuing Legal Education*, *supra* note 79, at 462.

86. *See*, Byron, *supra* note 84 at 361-362; and Parker, *supra* note 3, at 483.

87. Parker, *supra* note 3, at 478, argues that extensive investigatory procedures are unnecessary to determine compliance with requirements. In the absence of evidence suggesting misrepresentation, verified reports of attorneys should be accepted as correct.

88. Walkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (May 1975).

89. *Id.* at 576.

major cause of public dissatisfaction. The commercial courses that use advanced technology to work directly on skill improvement may be a partial answer, but the profession as now constituted appears to have only limited capacity to acquire new skills as opposed to absorbing substantive developments. Further, "skills" courses demand considerable expenditures of time and money. Presently, the profession does not seem willing to make such investments in continuing legal education.

4. *Specialization,* employed as a vehicle for insuring acceptable quality of profession-member activity, is a double-edged sword:

> The practice of the legal profession, both in the past and at the present, is to license its members for life upon good behavior and, by refusing to recognize specialties and specialization, to send them forth as qualified generalists to serve the public. The profession thereby fosters before the public the myth of the continuing competence and omnicompetence of the legal practitioner over the life of his career. This practice persists in the face of the increasingly technical and difficult nature of legal theory in every area of law and of the fact that never before have legal reform and change occurred at such a rapid pace.[90]
>
> This specialization, of necessity, tends to segmentize the law and, to some extent, emphasizes the mechanics of the law as distinguished from a broad sense of justice acquired from familiarity with the legal problems of people of different walks of life in a variety of situations.[91]

Specialization's two-edge characteristic has stimulated ambivalent application and acceptance. *De facto* specialization has long existed within the legal profession,[92] but the ABA has procrastinated, denying the official recognition of specialists that is a requisite for making specialization an instrument of quality control. A special ABA Committee on Specialization was estabished in 1967 to develop recommendations on the subject.[93] The majority report, produced in 1969, proposed restrictive guidelines and suggested that only a few states experiment with specialization, "lest unnecessarily divergent patterns become prematurely crystalized."[94] The minority urged

90. Parker, *supra* note 3, at 463.

91. Hon. E. Warren, *Law, Lawyers and Ethics: A Challenge to the Profession,* 23 DEPAUL L. REV. 633, 635 (1974).

92. Chetham, *Growing Need for Specialized Legal Services,* 16 VAND. L. REV. 497, 499 (1963).

93. 93 REPORTS OF AMERICAN BAR ASSOCIATION 141 (1968); Comment, *Specialization: An Overview,* 6 CUMBERLAND L. REV. 453 (1975); *see also,* Cohen, *Confronting Myth in the American Legal Profession, supra* note 35.

94. *Report of the Special Committee on Specialization,* 94 REPORTS OF AMERICAN BAR ASSOCIATION 249, 251 (1969).

immediate nationwide implementation of specialization programs.[95]

Two rationales may support legal specialization: one focuses on problems of client access; the other focuses on lawyer competence. The first theory views specialization as a unique vehicle for providing clients with efficient access to profession members having a particular expertise. Optimization of client access necessitates minimizing requirements for member entry into a specialty field and maximizing attorney willingness to both limit practice to the specialty and communicate that limitation to the public.

The second theory seeks to optimize competence through vehicles analogous to the medical specialty board certification. Entry into a specialty field is highly restricted by the use of extensive educational requirements, testing requirements, and other screening devices to assure a high threshold of competence. These added entry costs limit access to all but the sophisticated legal consumer who desires special services, not because the problem falls in a particular area, but because he values the need for an exceptionally well-qualified person and is willing to pay the price.

Three state plans implementing the special committee's guidelines provide an interesting contrast.[96] California, following the competency approach, requires five years' experience in a specialty area, some specialty education, a written and, in some cases an oral, exam.[97] Mandatory recertification every five years requires a minimum of ten years of experience and either specialized continuing legal education or another examination. New Mexico's plan implements the "access" theory of specialization. Specialty certification is accorded lawyers that have devoted over sixty percent of their time to the specialty over the last five years. Consequently, there is no direct evidence required concerning competence in the specialty. Florida's plan gives some deference to both theories. Members may obtain initial certification merely by asserting experience in the specialty area. Recertification, however, requires completion of specialty education. Florida allows specialization in any general field of law. New Mexico allows a broad specialization, while California permits specialization in only three areas of law.

Despite implementation of the above plans, the sentiment within the profession still seems strongly weighted against massive

95. *Minority Report and Separate Statement*, 94 REPORTS OF AMERICAN BAR ASSOCIATION 255 (1969).

96. The states are California, New Mexico, and Florida. For a discussion *see*, Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434 (1975); and Note, *Continuing Legal Education, supra* note 79. *See also, Three Plans—A Summary for the Busy Lawyer*, 48 FLA. B. J. 168, 173 (1974).

97. *See* Note, *Legal Specialization and Certification, supra* note 96, at 452.

adoption of formal specialization in substantive law fields.[98] Several specific arguments support this adverse sentiment. If substantive specialization is permitted, there will be a tendency on the part of all lawyers to develop specialities, particularly if advertising is permitted. This is merely a reflection of the natural tendency on the part of clients to opt for a specialist in lieu of a general practitioner, all other things, including cost, being equal. A related problem arises from the fact that the general practitioner subsidizes some general practice activities with the more economically efficient specialized activities. If such specialty clients are siphoned off, he may be unable to profitably confine himself to general problems despite an interest in, and willingness to serve, such areas.

Once these forces for full specialization have run their course, the profession will surely face the issue of how to deal with residual general practice problems. The development of high sensitivity to the dynamics of certain problems will naturally tend to dull sensitivity to the significance of the differences between problems. Thus, there may not be a balanced treatment of all important issues of a particular client's case not clearly within the specialty area of his lawyer. Issues falling outside the practitioner's specialty may be ignored or at least underemphasized. Further, cross fertilization of law fields may be diminished because specialization might tend to limit the lawyers' capacity to draw analogies between trends in other areas and trends in their own specialty.[99] These specialty-centered forces will erode "lawyer-like thinking", which depends heavily on analogy development and a certain level of preoccupation with the client's problems as seen through the eyes of the client rather than through the eyes of the specialty.[100]

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98. *See,* Note, *Legal Specialization and Certification,* 61 VA. L. REV. 434 (1975) and Cohen, *Confronting Myth in the American Legal Profession, supra,* note 35.

99. *See,* Warren, *Law, Lawyers and Ethics, supra* note 91.

100. *See,* Note, *Legal Specialization and Certification, supra* note 96, at 448. An example of this failure of lawyer-like thinking was set forth in an article concerning the U.C.C. The author found a "common casualty of specialization is the inability or failure of those who concentrate on one subject to identify the involvement or relevance of another field to their own activities. It has been the experience of this observer that lawyers who devote their professional careers to the problems of the Commercial Code are not generally familiar with developing principles in antitrust which might have an impact on their commercial law counseling. Certainly this is understandable, for more often than not, the two fields do not cross. But in 1967 the United States Supreme Court handed down a now famous antitrust decision, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) which few then recognized might have an impact drawing heavily from code cases.

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In *Schwinn,* the United States Supreme Court stated that consignments coupled with illegal price fixing were a *per se* violation of the Sherman Act, and further, that consignments used for customer or territorial allocation but absent price fixing would also support a finding of antitrust violation. Thus, one dealing only in a practice involving the U.C.C. may advise a

An obvious answer to this specialist-general practice dilemma is recognition of general practice as a specialty.[101] This approach has already been adopted by the medical profession, which recognizes the generalist-family practice as a specialty.[102] Bestowing a financial award for specialization on general practitioners may tend to increase the normal practitioner's competency. As this competency increases the more time is spent analyzing client problems in preparation for possible referral to specialists, the general practitioner will, in a sense, develop a specialty of choice.

The emphasis of substantive specialization would undoubtedly encourage specialists within a field to develop unique mechanisms for resolving contentious situations. A general decrease in resort to courts may well result, followed by a decline in trial advocacy as a skill separate from substantive specialty. This problem may have partially prompted some leading jurists, including the Chief Justice of the United States Supreme Court, to suggest that certification of substantive specialties is premature.[103] The decline of courts' importance has long been a lurking nightmare for many leaders of our profession. Even Roscoe Pound, a pioneer in sociological jurisprudence, tended to turn his back on the development of administrative law specialties, despite their functionality, for fear the trend would openly subvert the court's autonomy and central function in ordering mankind's affairs.[104] No doubt the demise of the court's autonomy and importance in Nazi Germany did much to kindle such thinking. From this perspective, specialization may indeed be premature, at least until such time as the profession has taken steps to insure practitioner allegiance to the substantive and procedural traditions underlying the courts.

For the court system to function properly, lawyers practicing before it must have a high level of competence in procedure, evidence, and courtroom performance skills. However, the question remains whether such allegiance should be forced on all members of the profession or merely held in highest regard by those specializing in trial advocacy. There are strong arguments to be made for distinguishing between trial advocacy and substantive skills. The

client into an untenable antitrust violation. Dusenberg, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 26 BUS. LAW 1189-1192 (1971).

101. The Florida specialization plan allows an attorney to designate himself a specialist in general practice. *See, Three Plans, supra* note 97, at 178.

102. Moser, *An Anti-Intellectual Movement in Medicine?* 227 J.A.M.A. 432 (Jan. 28, 1974).

103. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 62 FORDHAM L. REV. 227 (1973).

104. R. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, supra* note 5, at 32-38.

virtues of the English system, which does make the distinction between solicitor and barrister, are frequently used by persons advocating trial law as a specialty by itself. However, our admiration for the British system should not obscure the fact that there are definite advantages to be gained by maintaining the trial court tradition in every lawyer, regardless of substantive specialty.

In this country the principle of separation of powers involves a unique interrelationship between peoples and entities that is clearly of American origin. Other countries may embrace a similar principle, but the interrelationships of people and entities supporting it have distinctly different textures and origins. Thus, one must be cautious in borrowing pieces of one for another. Conversely, one cannot be wholly intransigent in making changes if allegiance to a tradition is totally dysfunctional for the rendering of necessary services to the consuming public. As actual litigation in the courts becomes a smaller and smaller portion of the average attorney's practice, it is appropriate to raise searching questions about allocating a constant amount of limited resources to an activity of diminishing utility. Only if one can assign to the tradition of courts an important role in maintaining our form of government, in addition to the role of serving individual clients, can the preeminence of the trial court tradition be maintained.

5. *Internal disciplinary activities* of the law profession are regarded by many professionals and laymen as the primary bulwark for coping with malpractice problems. They presumably detect and punish professional incompetents, deter others from acts of incompetence, and give lawyers as well as laymen confidence that profession members are to be trusted by clients and colleagues alike. Normally these activities are implemented through state and local bar associations. In jurisdictions where bar association memberships embrace a large portion of the licensed profession, such internal disciplinary activities could keep malpractice to the status of an isolated occurrence. In situations where association membership is only a fraction of those licensed, control of malpractice might prove elusive. Theoretically, the increase in integrated bar associations, where membership is a requisite for practice, should make internal disciplinary activities a central deterrent of malpractice.

Despite the logic suggesting the importance of disciplinary activities by the organized bar, two different studies sponsored by the ABA have found them to be, in fact, ineffective deterrents as now implemented. The ABA Special Committee on Disciplinary Enforcement (headed by Justice Clark) found state disciplinary structures underfunded, understaffed, and narrowly defined.[105]

105. Clark Committee Report, *supra* note 18.

State bars tend to limit disciplinary activities to complaint processing and do not scan for incipient malpractice conditions or investigate areas where there is smoke but no fire.[106] In essence, existing disciplinary rules are not being effectively enforced.

An American Bar Foundation study criticizes state bar regulatory activities for other reasons.[107] Bar associations seem preoccupied with unethical conduct, to the extent that they are occupied at all with malpractice concerns. Disciplinary committees also fail to uniformly regulate such unethical conduct even when detected. Thus, many complaints of deficient attorney performance are summarily dismissed as beyond committee jurisdiction because unethical conduct is not involved.[108] Until professional responsibility is viewed with appropriate breadth, so that technical as well as moral incompetence is actively sought out and treated, both state and local disciplinary committees will continue to fail the trust others have placed with them.

6. *Licensing boards* in most states currently screen candidates for admission with an examination and moral character review;[109] Montana and Wisconsin omit the examination for graduates of law schools within their jurisdiction.[110] Serious questions now surround the efficacy of these entry screening techniques as vehicles for insuring competence. Their utility to regulate the number of yearly entrants seems less in question. Because of the breadth of subject matter covered by the profession, exams can only sample competence and must focus on simple analytical routines not representative of the complexity inherent in many professional activities. Increased use of the uniform bar examination may improve both the quality of the questions and the quality of the grading,[111] but it is difficult to see such screening as now conceived ever becoming a highly reliable mechanism for insuring competence. The moral fitness screening seems to enjoy no better prospects, since the approaches now used, or those feasible with the manpower normally available, have no statistical reliability.[112]

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106. *See, e.g.*, Marks & Cathcart, *Discipline Within the Legal Profession, supra* note 11, at 225 to 230.

107. *See generally*, MARKS & CATHCART, *supra* note 11.

108. *Id.*

109. *See*, NATIONAL BAR EXAMINATION DIGEST (1976 Edition); Before the Bar, State-by-State Listings of Bar Requirements, (1976); *See also*, Note, *Being of Good Moral Character*, 4 STUDENT LAWYER No. 9 at 47 (May 1976); Chapin, *Scary, Ain't It?*, 4 STUDENT LAWYER No. 9 at 42 (May 1976).

110. West Virginia and South Dakota also omit examination of graduates from state law schools within their jurisdictions. Additionally, many states have reciprocity agreements (with varying conditions) which allow practicing members of another state bar to be admitted without examination. *See* NATIONAL BAR EXAMINATION DIGEST, (1976 Edition).

111. Chapin, *Scary, Ain't It?*, *supra* note 109, at 42-49.

112. Note, *Being of Good Moral Character*, *supra* note 109.

Recently, mandatory course enrollment prior to examination has been employed or advocated by some jurisdictions to improve entrance competence, especially concerning trial advocacy skills.[113] The logic behind such efforts seems to parallel that underlying specialists' certification. Unfortunately, there is little uncontroverted evidence that such mandatory education correlates positively with long-term competence in general practice.[114] Its proven value seems restricted to highly focused areas of practice, and endures for relatively short periods of time.

In summary, current license screening efforts have only questionable effect on maintenance of professional competence due to their lack of depth and substantive focus, uneven administration, and confinement to initial entry. Coordinating their use with educational prerequisites will do little to make such licensing a meaningful deterrent of incompetence by professionals five years or more into practice, especially in those areas undergoing significant change.

V. Legal Malpractice—Is Profession Action Adequate?

A. Empirical Assessment of Adequacy

To adequately discourage malpractice, professional activities must deal effectively with specific acts of legal malpractice and systematically eliminate the environmental elements that breed recurrent malpractice. The profession's success in achieving these two objectives is best assessed by examining the profession's processing of all alleged incidents of malpractice and surveying various constituencies to determine if the alleged incidents fully represent all actual malpractice. Case analysis of actual processing should reveal if there has been improper handling of any identified incidents of malpractice. General surveys of layman contact with the legal system should indicate whether malpractice complaints reflect the full range of dissatisfaction with the profession and thus whether current conceptions of malpractice are adequate. The profession's failure to properly define malpractice is as much an inadequacy as its defective handling of formal complaints of traditional malpractice; clearly, the profession itself should be in the best position to

113. *See, e.g.*, Cutright, Cutright, and Boshkoff, *Course Selection, Student Characteristics and Bar Examination Performance;* and Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations, supra,* note 30. *See also,* Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules,* 3 Hofstra L. Rev. 249 (1975).

114. Cutright, Cutright, and Boshkoff, *Course Selection, Student Characteristics and Bar Examination Performance, supra* note 30; *see also,* Pedrick & Frank, *We are Faced with a Clear and Present Danger, supra* note 30.

define its own performance specifications.

Some small empirical studies along the lines noted have been undertaken, but their breadth and depth are inadequate to do more than suggest that current profession activities are deficient.[115] Vast financial and human resources are needed to execute empirical studies adequate in dimension to establish the inherent value of the scientific approach for accurately measuring professional inadequacy and discerning optimal avenues for improvement. A utilization of the scientific approach without such a level of commitment may be misleading, and result in an inefficient allocation of improvement efforts. Such an under-committed approach would be reminiscent of the man who searched the vicinity of a street light for his watch lost some distance away, because the illumination was better under the street light than where he had lost the watch.

B. Heuristic Analysis of Adequacy

Heuristic study of professional malpractice and of the diverse responses to it can provide a good overview of the inadequacy of current profession activities in dealing with legal malpractice. With this knowledge specific empirical studies can be fashioned to explore areas where the current deficiencies appear most severe and the need for data to fashion improvement is most acute. The preceding sections of this article reveal many similarities among the various professions' training activities, internal organization, maintenance of identity, and relations with immediate clients. Parallels also exist concerning techniques employed to maintain professional competence, although there are significant differences in the effectiveness of the techniques employed. Why, then, are there such contrasts among the concepts for measuring competence? Disciplinary activities of lawyers focus primarily on normative notions of conduct; those of doctors and accountants dwell on skills, methods, and the results of professional activity as measured from several perspectives. May the profession's preoccupation with normative conduct, as the measure of threshold competence after admission, be viewed as a major inadequacy?

The legal profession claims exclusive authority to assess the competence of its members, and to discipline them in the event of

115. *See generally* Comment, *Disciplinary Enforcement Problems and Recommendations: An Indiana Survey*, 46 IND. L. J. 134 (1970); Note, *Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility*, 50 DENVER L. J. 207 (1973); Comment, *Procedures for Disciplining Attorneys in Virginia*, 29 WASH. & LEE L. REV. 439 (1972); Kane, *Lawyer Discipline in Florida*, 44 FLA. B. J. 522 (1970). *See also* Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK L. REV. 66 (1974); Commentary, *Public and Professional Assessment of the Nebraska Bar*, 55 NEB. L. REV. 57 (1975).

incompetence. Presently the courts and the organized bar discharge this authority.[116] In most jurisdictions these disciplinary mechanisms (1) are controlled by bar members, (2) emphasize procedural informality and discipline by peer concensus, (3) function on a decentralized basis with most work done locally, (4) operate in relative secrecy, (5) activate only upon receipt of complaints about specific members, and (6) focus almost exclusively on member misconduct or moral misbehavior.[117] Inherent in other professions are many of these features, especially professional dominance of the disciplinary process and the non-public nature of that process. Since a profession's social utility is directly affected by the public's confidence in each profession member, member incompetence is best kept from public view.

Despite similarities among professions, the legal profession is unique in the level of interdependence among its members. In the ordinary functioning of the legal system, the daily routines of individual lawyers often involve other profession members such as opposing counsel and/or judges. In contrast to other professions, a lawyer's effectiveness, regardless of task, is largely dependent on his ability to anticipate the conduct of other members, many of whom are relative strangers. It is also essential that the public believe that profession members will conduct business among one another in a manner consistent with the established principles of procedural due process and other concepts of fairness. A logical means to a suitable level of predictable behavior, among lawyers and between lawyers and clients, is for the profession to focus its limited disciplinary activities upon the necessary interpersonal conventions.

Unfortunately, many of these conduct rules reflect normative values established by a few members rather than behavioral realities derived from the experience of all members.[118] Thus, substantial resources of the profession must be allocated to ensure that members internalize, or at least obey, these norms. Much of the member acceptance of these values is engineered beyond public view by law schools, but education is not enough. Some norm maintenance must accompany the rendering of professional services. This maintenance must be done in a manner that maintains public confidence by minimizing the publicity of member behavior, which deviates from the profession's rules of conduct.

Lawyers' preoccupation with conduct and secrecy about deviations from conduct norms will become, if it is not now, the profes-

116. MARKS AND CATHCART, *supra* note 11, at 193-194.

117. *Id.* at 208-209.

118. *See, e.g.*, Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. R. 244, 254-262 (1968).

sional inadequacy with the greatest impact beyond the profession. The media's probing eyes and ears, coupled with its penchant for instant analysis, are likely to expose the flaws in lawyer performance, skills, methods, and moral conduct. Exposure will enable laymen to make independent judgments about these flaws, especially performance flaws which are easily observed and understood. It is unlikely that the absence of a breach of a conduct norm will retard the inclination of non-lawyers to publicly complain about a flaw, sue for damages, or limit further reliance on the profession. Additionally, in the long term, publicity will discourage others from relying at all upon the profession if alternatives are available.

Many factors now stimulate the public's awareness of flaws in the profession's performance, and a concommitant desire for professional accountability. These include broad national coverage of these flaws by all types of recognized media, and an increased level of educational and intellectual awareness of laymen,[119] accompanied by abundant comments on lawyers' techniques and strategies.[120] Recent examples of this coverage and analysis include local and national scandals involving lawyers, such as Watergate, Montana's Workman's Compensation investigation, the conflict of interest scandal that embroiled Florida's supreme court, and the Homestake Mining Company fraud in Oklahoma.

The natural evolution of government within the social structure at the federal, state, and local levels will also change the nature of public demands upon the profession. In a static, uncomplicated society, the profession is primarily involved in the adjudication of disputes on a case-by-case basis, and the lawyer's individual role is a relatively simple one. However, a sophisticated industrial society, permeated by government regulation and control of almost all commercial and economic endeavors, places many additional demands on lawyers that can easily overshadow traditional responsibilities. In such societies there is great dependence upon legislation, which contemplates extensive administrative regulation. Proper representation of individual and group interests in this context requires lawyers to engage in scientific kinds of research, broadly analyze problems, formulate intricate policies, and predict the probable acceptance and success of such policies in a highly sophisticated system.[121] This broad-gauged role of the lawyer in society was well

119. F. Brewster, *Professional Responsibility: The Lawyer's Task of Sisyphus*, 54 MARQ. L. REV. 180 (1971). As example of media coverage of flaws, see Special Report in U.S. News and World Report (March 25, 1974) entitled, "America's Lawyers - A Sick Profession?"

120. An example of this analysis is the cover story of Time Magazine concerning the defense of Patricia Hearst. Time, Feb. 16, 1976, at 96.

121. This idea is a paraphrase of a notion expressed in a book by E. L. Brown in her

stated by the California supreme court in a recent case:

> In a complex and interdependent society, human relations are even being further fitted into a framework of legal rights and responsibilities, and, in this process, the role of the lawyer has become dependent upon him, his responsibility must be broadened and deepened.[122]

As the interface of statutory and regulatory enactments with society becomes more complex, and access to proliferating data about the interface more difficult, the probability of lawyer error in practice substantially increases.

Improvement in the public's sophistication about the legal profession, and its increased reliance upon lawyers to cope with the growing involvement of government in the public's affairs, will prompt more strident demands for delivery of claimed expertise concerning skills, methods, and performance as well as conduct morality. If law schools continue to produce only traditional lawyers,[123] whose training emphasizes substantive legal principles rather than broader systemic analysis, claims of incompetence will surely increase. Recent actions by jurists to impose specific training requirements will do little to eliminate the stimuli for these complaints, since the internal practices of the courts seem to be the focus of such efforts, rather than expanding client needs. These judicial efforts will thus deprive law schools of resources needed to imbue law students with the broader perspectives required to operate efficiently in an administrative society, which is guided more by principles of economic efficiency than by lawyers' notions of justice and fairness. Consequently, professional education may be unable to produce young lawyers that meet public expectations. Also it seems clear that the profession has not assumed the responsibility for ensuring that existing members comply with the public's expectations. Several articles, including one by Marks and Cathcart entitled *Discipline Within the Legal Profession: Is It Self Regulation?*, provide a lucid taxonomy of profession failures in this regard.[124]

The Marks-Cathcart article notes that the process of "receiving and acting on complaints—or failure to act on them—is the chief way that the legal profession" approaches the post-admission task of self-regulation.[125]

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discussion of the role of attorneys in the legislative process. E. L. Brown, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE at 205 (1948).

122. Neel v. Magna, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P. 2d 421, 98 Cal. Rptr. 837 (1971).

123. *Supra* note 116, at 236.

124. Reprinted from ILL. LAW FORUM No. 2 (1974), *supra* note 116.

125. *Supra* note 116, at 206.

> Thus the nature of complaints made against lawyers is crucial. So too, are questions about who complains and who does not complain. Lawyers rarely complain to disciplinary agencies about other lawyers. Judges, too, are reluctant to complain to disciplinary agencies about either lawyer performance or lawyer conduct. Instead clients most frequently supply the regulatory inputs.[126]

Most client complaints dwell on matters of performance, skill, or method: such as lawyer oversight, procrastination, inept advocacy, and excessive fees.[127] However, the agencies in the profession that process these complaints employ principles and procedures focused on moral misbehavior.

> The inputs are client complaints which are primarily concerned with performance matters of competence, diligence, and applied skill. But the inputs are discounted because the disciplinary agencies, perhaps the profession as a whole, believe clients are unable to discern the proper or meaningful elements of the practice of law. Thus the outputs tend to presume that the complaints may raise only issues of lawyer misconduct or moral deviance.[128]

If grievance agencies search primarily for deviance in moral conduct to determine the validity of client complaints of performance, there seems to be little chance for objective performance standards to be developed.[129]

It seems logical that prompt *profession* development and enforcement of standards of skills, methods, and performance can largely preclude spiraling consumer dissatisfaction. In most instances, such development and enforcement can be integrated with existing programs directed at conduct critical to the maintenance of harmony among profession members. Should the profession fail to seize the initiative in controlling incompetence, elements beyond the profession will do so in a manner uncoordinated with the profession's interests in member conduct.[130] The irreverance of lawyers, HEW, and the FTC toward the medical profession's interests, and SEC actions concerning CPAs are good examples of how outside interests respond when professions procrastinate in internal reforms needed to limit unnecessary harm to consumers of professional services.

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126. *Id.* at 207.
127. *Id.* at 217.
128. *Id.* at 226.
129. *Id.* at 228.
130. Part VII of this article discusses various ways for the profession to seize the initiative.

C. *External "Regulation" as an Indirect Measure of Adequacy*

1. *General Comments*

The inadequacy of internal regulation suggested by this heuristic analysis and the few existing empirical studies can be corroborated by examining the extent to which various constituencies deal with lawyer incompetence by resort to procedures not controlled by the profession. This approach highlights the serious effects resulting from inadequate profession procedures, thus providing the profession with a greater feeling of urgency to cope with the problem. Unfortunately this approach does not disclose the broad range of data necessary to fashion an effective response to these inadequacies.

Public dissatisfaction with the quality control of professional services through internal professional regulation is best illustrated by recent events involving the medical profession.[131] Incompetence involving individual patients has generated an increasing number of medical malpractice suits, which elicit the aid of forces outside the medical profession. Groups of prospective patients, as well as insurers of groups, have analyzed the provision of medical services by various profession elements to assess quality and determine if the conditions for rendering such services are equitable. The FTC, FDA, HEW, and many other governmental entities acting on behalf of the general welfare are constantly examining various elements of the medical profession and formulating recommendations that tend to externalize the regulation of professional competence. Although there is great diversity in the external activities for dealing with incompetence in the medical profession, patterns are developing that suggest various interest groups affected by the profession favor distinctive approaches for dealing with it on an external basis.

The legal and accounting professions have yet to experience the same level of external interference with regulation of member competence, perhaps because incompetence does not affect as many people in such an obvious and intense way, and the apparent cost of professional services is not nearly as great for all citizens. However, similar patterns of external response are now developing over the provision of legal services. The rapid movement towards an administrative society will accelerate this trend, as lawyers become common buffers between people and the government at all levels.

131. Newspaper, magazines and journals are filled with articles about the medical profession and the soaring costs of malpractice, brought about at least in part by the great number of malpractice actions filed against physicians by disgruntled patients. *See,* e.g. Sheehan, *The Medical Malpractice Crisis in Insurance - How it Happened and Some Proposed Solutions,* FORUM, Fall 1975 at 80; Plant, *The Medical Malpractice Crisis,* UNIV. OF MICHIGAN LAW QUADRANGLE NOTES, Winter 1976 at 12; and TRIAL, May/June 1975.

2. *External Actions by Individual Clients*

For many years individual clients dissatisfied with their lawyer's performance have sought redress through litigation.[132] Complaints against lawyers have been thrust into public prominence because of two significant occurences: the events of Watergate and notoriety concerning escalating medical malpractice costs. The greatest attention surrounds legal services to corporate interests and celebrities involving alleged misjudgment, lack of diligence in investigating the factual basis for opinions on legal matters, or fraud. However, court reports disclose evidence of professional incompetence concerning the interests of less illustrious clients.[133]

A recent survey by a major insurance carrier lists four significant groups of legal malpractice cases. Errors involving statutes of limitations, missed appearances in court, misfiled documents, and similar forgetfulness amounted to 45% of malpractice actions; errors in legal judgment constituted 25% of the claims; 21% of the claims were the outgrowth of unclear relationships between clients and lawyers; and alleged fraud on the part of the lawyer amounted to 9% of the claims.[134]

Forgetfulness undoubtedly prompts most suits, since its consequences are clearly unnecessary, absent some intervening cause.[135] The probability of harm is great, while the burden of taking adequate precaution to preclude such an occurrence is slight. In such an instance a *prima facie* case of legal negligence exists.[136] There

132. *See* Rothstein, *Lawyers' Malpractice in Litigation*, 21 CLEVE. ST. L.R., May 1972 at 1; Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOK. L. REV. 233 (1953); Issacs, *Liability of the Lawyer for Bad Advice*, 24 CAL. L. REV. 39 (1935); Note, 63 COL. L. REV. 1292 (1963).

133. *State v. McElveen*, ___ Mont. ___, 544 P.2d 820 (1975), provides a good example of this point. See discussion of this case below. 37 MONT. L. REV. 387 (1976).

134. Luvera, *Avoiding Legal Malpractice*, CASE AND COMMENT Vol. 80, No. 5 at 3 (1975).

135. Cf. Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238, 1248 (1975).

136. Walker v. Porter, 44 Cal. App. 3d 1, 74, 118 Cal. Reptr. 468 (1974). The facts of decided cases provide a perspective of the range of situations where professional self-regulation proved inadequate in deterring oversight by professionals. In California a woman injured in a fall caused by a construction trench had a prima facie case of legal negligence when her attorney failed to bring an action against the contractor, the county or her landlord within the time allowed by the statute of limitations. *See also*, Fuschetti v. Bierman, 128 N.J. Supp. 290, 319 A. 2d 781 (1974). In Louisiana a negligence action was allowed against an attorney who failed to bring the plaintiff's workman's compensation claim within the one year statute of limitations. Jackson v. Zito, ___ La. ___, 314 So. 2d 401 (1975). The failure of an attorney to file a petition for discharge in bankruptcy was the basis for a California negligence action. Feldesman v. McGovern, 44 Cal. App. 2d 566, 122 P.2d 645 (1941). An old Montana case involving a lawyer's failure to appeal a case within the time allowed surely would have been the basis of a negligence action had not one attorney absconded with the client's money. State ex rel. Benton v. Baum, 14 Mont. 12, 35 P. 108 (1894).

Several cases involving default judgment provide further factual situations against which

seems little reticence on the part of courts to impose liability, since such cases are normally classic opportunities to apply the principle of wealth redistribution based on fault. The failure to perform at even a minimal level is obvious and no member of the judiciary could condone forgetfulness at critical stages of the litigation process without suffering public scorn.

Legal judgment is clearly one of the profession's most important skills, and courts frequently respond favorably to clients who have contracted for, but not received, such judgment from lawyers. Many of these cases directly reflect the profession's ambivalence toward standards for professional judgment, and its unwillingness to employ internal regulatory resources to ensure that lawyers possess and competently exercise such judgment. The inadequacy of self-regulation involves many different types of legal judgment. Upon receipt of a case, a competent lawyer should recognize the legal consequences of the facts presented by the client and investigate those facts which seem critical.[137] Self-regulation fails to enforce these professional obligations, and thus clients seek assistance elsewhere.[138] Similar problems confront a client employing an attor-

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claims of negligence involving forgetfulness can be assessed. In Pennsylvania, default judgment was entered against a defendant because his attorney failed to answer the complaint. Smith v. Tonon, ___ Pa. ___, 331 A.2d 662 (1974). The attorney was even more negligent when he failed to petition to open the judgment within the allowed time. Default judgment was entered against a Michigan defendant when his lawyer, who was present at a meeting setting a pre-trial conference, failed to appear at the scheduled pre-trial conference. Kiilunen v. Moodie, 55 Mich. App. 128, 222 N. W. 2d 303 (1974). A Colorado court denied the motion to set aside a default judgment where an attorney was two days late in entering an appearance because of his heavy schedule of appearances in litigation of other cases. The court denied the motion despite the fact that it took notice of the attorney and his firm's large and substantial practice and the heavy pressure the attorney was under at the time in question. C. F. & I. Steel Corp. v. Robb ___ Colo. ___, 535 P.2d 491 (1975). Another Colorado case described as "gross negligence" the acts of an attorney who, upon being granted an extension of time to file an answer in an action for breach of contract, subsequently failed to answer. *Dudley v. Keller* ___ Colo. ___, 521 P.2d 175 (1974); *see also* Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971). But in a Montana default judgment case the court reversed a trial court refusal to open the judgment when the defendant's attorney, who was a candidate for office, simply forgot to make an appearance or answer the complaint because of the fact that he was in the heat of a political campaign and canvassing for votes, Scully v. Babcock, 39 Mont. 536, 104 P. 677 (1909).

The plaintiff's wrongful death action on a California case was dismissed when counsel failed to serve summons within three years of filing the complaint. *Supra* note 122. In *Neel*, the plaintiff had hired counsel who associated with another firm as counsel of record and had done so without informing the plaintiff. The original attorney had filed the action but neither he nor the associated firm arranged for service of summons.

"Forgetfulness is not sufficient basis for vacating default judgment." Uffleman v. Labbitt, 152 Mont. 238, 448 P.2d 690, 694 (1968). Consequently, in situations involving forgetfulness it is unlikely that the attorney can escape the issue of liability.

137. Burien Motors, Inc. v. Balch, 9 Wash. App. 573, 513 P.2d 582 (1973).

138. A recent Montana case overturned the felony conviction of a Montana State prison inmate partly because the defendant's attorney had failed to talk to any witnesses or investi-

ney whose judgment is faulty, because of a failure to stay abreast of legal development in his jurisdiction by reading advance sheets[139] or by mastering the contents of state statutes and related cases.[140]

Apart from clients injured by non-diligent enforcement of professional standards, there are others who seek external aid regarding lawyers' failure to exercise commonly recognized professional judgments yet to be incorporated in official profession standards. The doctrine of informed consent between doctor and patient has long been recognized,[141] but clients often must resort to the courts to obtain similar disclosures from their lawyers.[142]

Unclear relationships between clients and attorneys have generated several suits, which might have been avoided had self-regulation ensured acceptable levels of member sensitivity to the

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gate any facts beyond interviewing the defendant to obtain his version of what purportedly transpired. State v. McElveen, *supra* note 133. In another Montana case, one involving a default judgment, the court refused to overturn the district court judgment when the attorney failed to ascertain the date required to answer. The court found the failure to discover essential facts concerning the case was gross negligence. "We say gross negligence because the only inference that can be drawn here is that the defendant neglected to inform counsel of the date of service of summons, and counsel in turn neglected to inquire of defendant and ascertain for himself the date of service." Robinson v. Peterson, 63 Mont. 247, 206 P. 1092 (1922). A similar question of judgment arose when counsel assumed an action against his client was an ordinary ejectment action when it was, in fact, an action for forceful entry or unlawful detainer. Counsel exercised poor judgment in not fulfilling his obligation to read the summons and acting on the basis of false assumptions. *Eakins v. Kemper*, 21 Mont. 160, 53 P. 310 (1898).

139. Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 266 N.E. 2d 810 (1971).

140. Clinton v. Miller, 124 Mont. 463, 226 P.2d 487 (1951), implies that, at least in Montana, an attorney must be familiar with statutes.

In a Michigan case an attorney's failure to attend a pre-trial conference because he believed his attendance was required only if official notice was received, was viewed as actionable when he had actual knowledge of the time and date of the conference. Kiilunen v. Moodie, 55 Mich. App. 128, 222 N. W. 2d 303 (1974).

In Montana the court has held that a mistake at law "is not such a mistake under the provisions of Rule 60 (6)(1), M. R. Civ. P. as will vacate a default judgment." Uffleman v. Labbitt, 152 Mont. 238, 448 P.2d 690, 693 (1968). The liability of the attorney in such a case may be twofold. Liability might exist on the basis of judgmental error; it is also likely to exist because of "forgetfulness." The failure to exert the professional effort to minimize the probability of harm to the client at a time when the possibility of harm is great is likely to be the basis of liability.

141. PROSSER, LAW OF TORTS § 106 at 695 (4th Ed. 1971).

142. In Hendrickson v. Sears, ___ Mass. ___, 310 N. E. 2d 131 (1974), the plaintiff had retained the defendant attorney to search the title to real estate that the plaintiff intended to buy. The attorney certified the title was valid, clear and marketable. The property was purchased and later when the plaintiff attempted to sell the property, the prospective purchaser refused to take it without modification because there was a recorded easement running through the premises. The Massachusetts court said, "The attorney, like the doctor, is an expert, and much of his work is done out of the client's view. The client is not an expert; he cannot be expected to recognize professional negligence if he sees it and he should not be expected to watch over the professional or to retain a second professional to do so . . . . The attorney owes his client the duty of full disclosure of facts material to the client's interest." Henrickson v. Sears at 135.

persons' interests directly affected. Lawyers should realize that lack of privity does not truncate the responsibility to safeguard the interests of a client's beneficiaries,[143] nor does legal advice rendered gratuitously to an individual mitigate[144] the standard of care normally applicable to paying clients. Court actions plainly reveal inadequate profession standards, when the defendant-lawyers assert defenses that reflect genuine surprise concerning the existence of professional obligations to the clients harmed. Here moral misconduct is not involved. What is involved is lack of knowledge and skill, more the fault of the profession's ambivalence on standards rather than the individual's lack of diligence in learning and applying established standards.

Although lawyer fraud suits also evidence client dissatisfaction with the conduct of a profession member, they are not caused by the absence of internally developed standards or non-enforcement of those standards, unlike suits involving other categories of lawyer incompetence. Consequently, the existence of such suits is not a convincing example of the inadequacy of self-regulation.

Malpractice claims by individuals, apart from reflecting dissatisfaction with current profession self-regulation, highlight the dominant forces of malpractice. The limitations inherent in the members as individuals seem to generate the greatest number of problems. Professional training inadequacies may currently be responsible for some problems associated with professional judgments and unsatisfactory client-lawyer relationships. As the environment in which

143. The testatrix in Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), told the defendant attorney she wanted her entire estate to pass to her two daughters. She did not want any of the estate to go to her soon to be second husband. The attorney drafted a will which failed to mention the husband except to name him executor of the estate. When the testatrix died, the husband successfully claimed part of the estate as a post-testamentary spouse. The attorney was held liable despite the lack of privity with the daughters because "public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose right and interests are certain and foreseeable." Heyer v. Flaig at 165. Another California case found an attorney who erred in drafting a will could be held liable to a person named in the instrument who suffered deprivation of benefits as a result of the mistake. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

144. The Federal District Court for the District of Columbia found an attorney liable to a bank for gratuitous advice given to the bank concerning the security interest one of his clients had in certain property. Security National Bank v. Lish, 311 A.2d 833 (1973). The attorney's client had offered a partial interest in personal property as collateral for a twenty-five thousand dollar loan. The attorney, an attorney of considerable reputation and experience, assured the bank the client was in a position to execute a second trust on the property. As a result, the bank made the loan without a title search. A subsequent default on the loan disclosed a pre-existing second trust which was superior to the bank's interest. The court held "a lawyer scarcely may be held to a lesser standard of care simply because his inaccurate representations (however innocently made) are conveyed to a non-client." Security National Bank v. Lish at 835. The question of the attorney's liability was not reached in the reported decision.

lawyers serve clients becomes more complex, even more individual client problems may be caused by inadequate professional training, unless substantial changes are forthcoming.

3. *External Actions by Group Interests*

The profession has previously ignored its responsibilities to large interest groups; thus prompting external interference with self-regulation far more serious than a few malpractice claims.[145] For example, it allocated few resources to service the underprivileged on most civil and criminal matters before 1960. Although some profession initiatives concerning the underprivileged were forthcoming during the '60's, they did not match the vigor of the profession's claim of full concern for all. The government intervened to provide legal services in civil matters[146] and after *Gideon*[147] courts frequently undertook to assign counsel in criminal matters. Subsequently, law schools have sought to deal with this deficiency by changing curricula emphasis, but the important point is that most initiatives were externally conceived and implemented.

Manifestations of the profession's neglect of client groups and beneficiaries of lawyer-client transactions have taken many forms. Amid profession harassment, unions have sought to employ captive lawyers to assure adequate and timely representation of individual member interests.[148] Recently, a few lawyers have established legal clinics without the profession's encouragement. Enterprising individuals outside the profession have fed the unattended interests with a plethora of how-to-do-it-without-a-lawyer books and articles. Finally, some groups and individuals have directly sought to embarrass the profession into action by disclosing areas of reckless professional disregard for client groups and beneficiaries.

The sources of these professional inadequacies are quite different from those stimulating individual malpractice suits. Central to the problem are the profession's inabilities to recognize or anticipate the legal service requirements of specific subsets of the population, to design mechanisms for providing the needed services, and to ensure the effective employment of such mechanisms. Although blame is not easy to fix, the structure of the practicing profession is undoubtedly the focus of many of these inadequacies. The educational institutions have exacerbated the problem by being reticent

145. See Part II of this article.

146. E. JOHNSON, JUSTICE AND REFORM (1974).

147. Gideon v. Wainwright, 372 U. S. 335 (1963).

148. As examples of professional harassment, *see* United Mine Workers of America, Dist. 12 v. Ill. State Bar Association, 389 U. S. 217 (1967), and Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964).

critics and failing to identify and analyze the problems. Despite the existence of adequate information and the resources for data collection and analysis, such insitutions often only begrudgingly develop new human resources necessary to efficiently cope with these problems.

4. *External Actions on Behalf of Society's Interests*

Recent legislative activities concerning no-fault insurance and divorce, administrative proddings for professional advertising, and court decisions on the illegality of fee schedules might be viewed as still further evidence of dissatisfaction within various constituencies. However, these activities are better classified as reflections of the profession's failure to adequately serve society's interests in efficient and effective dispute resolution. Although law schools have at times been inept and tardy architects of professional innovation, and thus partially responsible for the necessity of such legislative, administrative and court activities, the profession's structure is the major source of existing inadequacies. Unfortunately the bar has been more than nonfeasant in meeting these social needs. News media, association journals, bar association resolutions, and government hearing records chronicle the incessant efforts of the organized bar to retard change from within or without. The motives underlying these efforts are diverse and the merits of some changes are as yet unknown, but neither of these observations can justify the professional selfishness that sustains much of the active resistance to change.

D. Profession Response to External "Regulation"

Despite the profession's responsibility for causing various constituencies to seek external regulation regarding some types of malpractice, lawyers have also responded constructively to these manifestations of dissatisfaction. Thus it may be only a matter of time before self-induced changes—that is, self-regulation—will reduce or eliminate some inadequacies as seen from the perspective of one or more of these constituencies.

Clients injured by fraudulent actions of profession members are often eligible for reimbursement from bar association security funds.[149] Unfortunately, client injury resulting from professional incompetence is not similarly protected and there seems little support from the bar for such litigants, even in deserving cases.[150] Fortun-

149. Clark Committee Report, *supra* note 18.

150. Some medical associations have sought to provide this support to wronged patients.

ately, however, lawyers have not yet sought modification of the legal principles governing the recovery amount, the statute of limitations,[151] or the right to litigate as the medical profession has done.[152] Of course, as the frequency and amount of awards increase, lawyers may seek modification of their own rules for selfish ends.[153]

Recently, some elements of the profession have embarked on ambitious programs to anticipate legal service needs of under-

151. This good fortune may be transitory. It appears that California, a state deeply involved in the medical malpractice crisis, may be taking similar protective measures for the legal profession. The California Assembly Judiciary Committee Chairman, Willie Brown, has introduced A.B. 3068, reducing the statute of limitations from four years to three years *after* the negligent act, not discovery of it, and one year after discovery. STUDENT LAWYER, May 1976 at 14.

152. The rising number of malpractice suits, particularly against members of the medical profession has caused insurance rates to rise drastically, threatening to make the practice of medicine prohibitively expensive. Consequently, the medical profession has proposed a variety of steps to reduce insurance premiums and to make insurance available to all doctors. *Ohio Strives to Resolve Malpractice Problems*, 4 J. OF L. MED. 30 (Jan. 1976); Hirsh, *Malpractice Crisis: Fact or Fiction*, 80 CASE AND COMMENT 3 (1975).

Several approaches have been adopted for restricting the rights of injured patients to sue. 11 FORUM 80 (Fall 1975). One involves curtailing the length of time a patient has to file suit - usually specifying an absolute maximum. This is important since a major reason for the increase in today's premiums is the unpredictability of amounts of recovery in future years. In many states the statute of limitations does not start to run until the injury is or should have been discovered. This gives tort claims an indefinitely long "tail" which makes it extremely difficult to calculate future recovery amounts for presently issued policies.

Absolute recovery limits have been proposed and in several states enacted. The Florida Medical Association, for example, proposes limiting recovery for death of an adult to $50,000; for 100% permanent impairment to $50,000; and up to an additional 100% of the limit imposed if willful or wanton gross misconduct is found. 11 FORUM 80 (Fall 1975).

Some proposals attempt to resolve tort claims either before they are formally filed or soon after they are filed. The Michigan Medical Association for a time backed a proposal to allow hospitals to require patients to sign an agreement binding them to settle any claims through an arbitration board. 54 MICH. S.B.J. 355, 356 (1975). The association relented after receiving strong criticism by the Michigan Bar, the United Automobile Worker's Union, and several newspapers.

Other less stringent arbitration provisions have found more success. In Indiana, all claims are required by statute to be investigated by a medical review panel composed of a non-voting supervising attorney, a plaintiff expert, a defense expert, and a third expert appointed by the other two experts. MEDICAL ECONOMICS, Jan. 9, 1975 at 29. The finding of the panel is not binding but is admissible in court. In Montana, the medical association and the State Bar have jointly created a review panel which claimants can consult if they desire. 36 MONT. L. REV. 321 (1975). The panel is composed of an equal number of doctors and lawyers. The intent of providing the panel ostensibly is to provide expert analysis of an injured patient's claim, hopefully helping a claimant obtain expert analysis which he otherwise might be unable to obtain. If the panel finds the patient was injured through the negligence of a physician, the panel will provide expert testimony at the trial. If, however, the panel finds no negligently caused harm, the plaintiff's attorney is bound not to file suit unless he is compelled in good faith to do so.

In Southern California, hospitals are attempting to use contracts for care which provide for binding arbitration. 1 J. OF L. MED. 30 (May/June 1973). To avoid charges of unconscionability, the contracts stipulate that they may be rescinded within 30 days after treatment has terminated. Very few exercise this option.

153. This matter is discussed *supra* note 151.

represented groups and to design approaches for serving those needs.[154] Many forms of prepaid legal services have been tried and studied. Large segments of the population have been surveyed to anticipate non-monetary impediments to optimal distribution of legal services. Research has been undertaken to design more efficient methods of distributing services in varied forms. Law school curricula have grown much more responsive to new perceptions of skills in short supply. Finally, concepts of permissible formats for distributing services have broadened considerably, although there still remains much resistance among segments of the bar. Despite such progress much rigidity continues in the substantive and procedural rules of the profession, impairing the interests of some client groups. The profession's structure also delays the implementation of meritorious changes.

Very few constructive approaches have been taken to correct the profession's deficient responses to broad social needs. Almost all external efforts for change are opposed by some sizable segment of the profession. Little progress on this point is likely. Aside from being insensitive to the profession's obligations to society generally, many members view changes in the interest of the public as assault on the central virtues of the legal system. Thus, externally imposed change is the only way to modify the manner in which the profession serves the public.

VI. MALPRACTICE—A CALCULUS FOR ANALYZING PROPOSED SOLUTIONS

A. A Summary of Current Inadequacy

Current lawyer self-regulation does not ensure adequate minimal standards for skills, methods, or performance. Even moral conduct standards are deficient as applied in many instances. The resulting externalization of complaints by constituencies served by

154. A number of examples of affirmative programs are set forth in the ABA publication ALTERNATIVES: LEGAL SERVICES AND THE PUBLIC, Vol. 3, No. 2, Feb. 1976.

The Camden County (N.J.) Bar Association's Lawyer Referral Service sponsors a weekly column in twenty-one different local newspapers, entitled "Knowing the Law" and "It's the Law." The column features a list of common legal questions and answers to those questions, which are formulated by members of the bar. The column has successfully brought the public's attention to the bar referral service.

The Harlem Lawyer's Association in New York sponsored two sidewalk legal clinics. Tables, chairs, and a mobile unit were set up near a busy intersection in Harlem where lawyers, assisted by law students, representatives of the phone company, the stock exchange and the city university, offered free legal advice to passersby.

Legal counseling to the elderly recently was enacted as part of Public Law 135, the Older Americans Act. The amendments require that at least 20% of the funds allocated to each state under section 303(b) of the Act be spent on certain projects for the elderly.

The award of attorneys fees to successful litigants is being studied by a number of governmental and ABA entities.

the profession has not stimulated much improvement of self-regulation except in a few instances. Thus, the profession has not captured the initiative in developing standards for skills, methods, or performance. The profession even seems to be losing control of some of its conduct standards to external groups, which advocate standards for skills, methods, and performance that are not fully compatible with the profession's moral conduct standards.[155] Efforts to reverse this trend are growing, but they seem ill-conceived.

Some within the profession, observing this slippage of self-control through inadequate self-regulation, advocate nearly total revision of ethical codes and enforcement procedures to effect more stringent moral standards within the profession. Bar grievance committees are urged to diligently pursue all conduct breaches, to inform all interest groups of their existence, and to disseminate information concerning their activities. Further, proposals suggest that local Bar advisory groups be established to monitor the general level of member conduct in a given legal community. Unfortunately, this approach continues to dwell on matters of little importance to the three main constituencies. Their complaints will continue until, and unless, self-regulation produces a substantial improvement in lawyer performance.[156]

Various state and federal courts on their own motions have recently asserted more control over the profession and attempted to extend control over professional schools to quell outsider dissatisfaction.[157] This control is through mechanisms such as prescribed law school courses,[158] board certification for entry, periodic recertification, specialization certification, and continuing legal education.

155. For example, see: Hobbs, *Lawyer Advertising: A Moderate Proposal;* ALTERNATIVES: LEGAL SERVICES AND THE PUBLIC, Vol. 3, No. 2 at 3, Feb. 1976; and an article entitled, "Closing in on the Professions" in Business Week, Oct. 27, 1975 at p. 106.

156. *Supra* note 116, at 207.

157. Qualifications for Practice Before the United States Courts in the Second Circuit, 67 F.R.D. 159; Burger, *Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 1385 (1975); Kaufman, *A Response to Critics of the Second Circuit Admission Rules*, 61 A.B.A.J. 1514 (1975).

158. The Second Circuit Subcommittee to review law school curricula recommended thirteen courses as either essential or desirable for efficient advocacy, as well as five additional courses which they considered important but nonessential for efficient advocacy. The consensus of the full committee was that there were certain courses without which the probability of competence in advocacy was extremely remote. The essential courses are: 1) Evidence; 2) Civil Procedure, including Federal Jurisdiction, Practice and Procedure; 3) Criminal Law and Procedure; 4) Professional Responsibility; and 5) Trial Advocacy. 67 F.R.D. 159, 168. For contrary views, see: Boscoff, *Course Selection and Rule Thirteen in Indiana*, 27 J. LEG. ED. 127 (1975); and Pedrick & Frank, *We are Faced with a Clear and Present Danger*, LEARNING AND THE LAW, (Winter 1976).

Although such efforts will no doubt reestablish the judiciary's traditional preeminance within the legal fraternity, they fail to attack directly the problems outsiders seem to have with the legal system. These judicially-imposed screening mechanisms will decrease the probability of poor performance by raising the general threshold of "tested" competence. However, this probability cannot be brought anywhere near zero without forcing a "Wall Street" lawyer on all consumers, along with the associated costs. If such screening approaches are employed, many needs of various interest groups now satisfied by "marginal-probability" lawyers will go unsatisfied, because these lawyers will be screened out. Consequently, an even greater percentage of the public will lack legal services.[159] Further, such screening machinery possesses little capacity to discriminate *between* the needs of the three constituencies. Even if some problems of individual clients could be reduced through specialization or recertification, such measures are at best crude tools for eliminating the dissatisfaction of either the client groups or the broad social interests.

Preoccupation with intra-profession relations and the needs of individual clients has been a hallmark of self-regulation, ineffective as it may be. Yet, in an administrative society the profession's chief role should be tending to the needs of groups and the general social welfare. If self-regulation fails to deal directly with deficiencies in serving this role, external regulation will be imposed or the profession's functions regarding these interests will be curtailed.

B. Relevant Factors for Improving Adequacy

Assuming that the profession wishes to avoid such adverse consequences, it is essential that self-regulation efforts be redesigned to accommodate the needs of these interests as well as the traditional needs. However, such accommodation must be achieved with finite resources. Thus, efforts must be carefully coordinated not to work at cross purposes with one another, and such efforts must be focused on those areas where the greatest probability of harm exists.

A starting point for meeting these objectives is the development

159. The last decade has produced numberous studies of various population subsets that have limited access to legal services. Minorities have received greatest attention, but substantial work has also been done to identify the level of legal representation for low income families generally. For example, see Lochner, *No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW AND SOC. REV. 431 (1975). There is also considerable research on what the profession does once inadequate representation is disclosed. See E. JOHNSON, JR., JUSTICE AND REFORM (Russell Sage Foundation, 1974). During the last three years considerable data has also been collected on the inadequacy of legal representation of middle class families concerning various types of legal issues. See CURRAN AND SPAULDING, THE LEGAL NEEDS OF THE PUBLIC (ABF, 1974).

of a single calculus that can be used to identify the legal practice conditions where the greatest harm from legal incompetence, in terms of number of incidents or impact per incident, is likely to occur for each of the elements affected. The variables for such a calculus should ideally be common to most legal undertakings of a given profession-member on behalf of one of the three constituencies previously discussed. Four elements common to all legal undertakings are: (1) a lawyer, (2) a specific legal task, (3) a client or interest, and (4) an environment in which the first three interact.

Many characteristics of a lawyer, or group of lawyers, may affect the quantity and quality of harm the lawyer is likely to visit upon a client, a client class, the profession, or society in general. Among these characteristics are intellect, number of cases or transactions supervised in a given time period, and amount of experience concerning particular classes of transactions. Greater intellect, especially when novel or complex tasks are involved, should correlate with a lower probability of harm. As transaction density increases to high levels, the probability of harm should increase. Increased experience should reduce the probability of harm, allow the transaction density to increase, or intellect to decrease, without increasing the probability of harm.[160]

Legal tasks can be classified in many ways, but for purposes of predicting harm the factors of level of complexity, degree of detachment from common sense or experience, and the disparity involved between law on the books and law in action are especially salient. The more complex an issue or task, the greater the likelihood that some aspect of it will be mishandled. Mishandling is also more likely as the degree of the law's detachment from common sense, or the disparity between the law on the books and the law in action increases.[161]

The client's sophistication and the complexity of his needs are

160. The concepts of apprenticeship and internship were developed in large measure out of recognition of the interrelationships between experience and competence. Several years of experience in the courtroom or real estate closing office substantially reduce the probabilities that critical steps in the trial or closing process will be overlooked, regardless of a lawyer's intellect. Without such experience, preparation time for a single case must necessarily be higher to avoid negligent omissions. As experience increases, such preparation time can be substantially reduced and thus the number of transactions handled during a set period increased.

161. The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §651 *et seq.*, is one of the most publicized examples of a law whose scope of application and implementing rules are viewed by many as often contrary to common sense. Thus, rendering advice to clients regarding OSHA can be a perilous enterprise for lawyers, especially in light of the organization and specific wording of the numerous regulations. Similarly, rendering advice based upon literal interpretations of statutes and ordinances can prove embarrassing since many valid statutes are in fact seldom or never implemented. The folklore of every town and state embodies its own list of such laws.

major factors of the client element, which affect both real and perceived harm. Sophistication affects an interest group's initial expectations concerning the lawyer's services, its ability to recognize incompetence, and its capacity to assess the full consequences of such incompetence. Similarily, increased complexity of the client's composition makes it more difficult for the lawyer to sense the client's real needs regarding the legal task. This, in turn, can impair communications between the lawyer and the client and make optimal resolution of the problem more elusive.[162]

The environment is the forum in which the legal transaction takes place, or the circumstances under which the lawyer does his work. Many elements of the forum affect the incidence of incompetence, but level of formality, or sophistication of purpose, are possibly of greatest importance. The most obvious dichotomy is that between the federal courts and the municipal courts. (However, distinctions between courts, legislatures, and administrative entities, and between rulemaking and adjudication within an agency ought not to be ignored.) It is commonly assumed that the federal courts subject the lawyer to greater scrutiny and higher practice standards, because of the caliber of the other lawyers engaged in the same transaction. Further, the Federal Rules of Civil Procedure favor a substantial level of preparedness. Conversely, municipal courts favor simplicity rather than preparedness to accommodate the individuals in the process, and lawyers are not held to high substantive and procedural standards. If one views environment in terms of formality, a higher incidence of incompetence will likely appear in formal settings if all lawyers access the forum. However, in reality formality tends to screen out incompetent lawyers. If this factor is recognized, the level of actual incompetence of representation is likely to be highest in an informal setting.

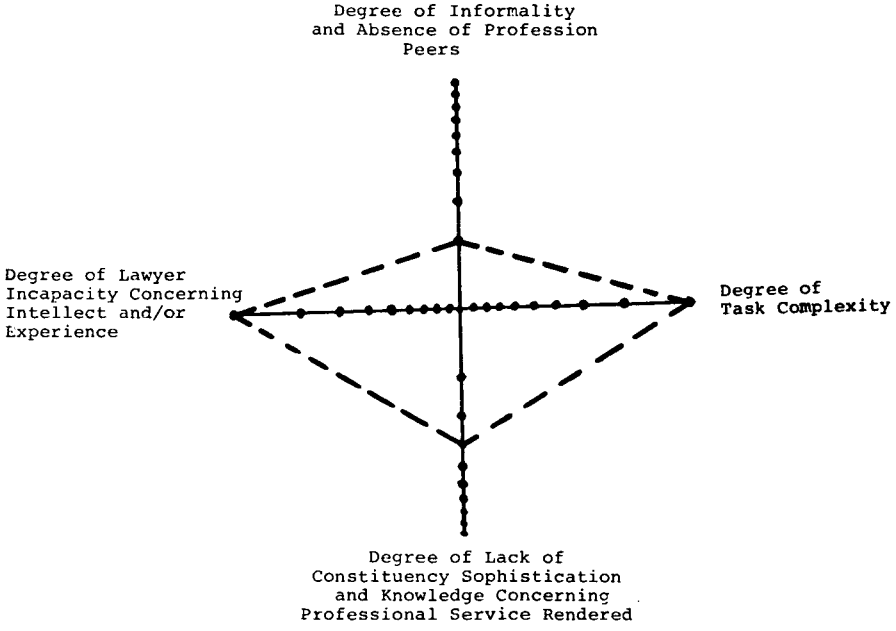
C. A Framework for Relating Factors to Anticipate Inadequacy

Each of the four elements discussed above has its greatest predictive value when a circumstance involves an extreme example of that element. However, an extreme case involving one element by itself will seldom justify a prediction of malpractice or incompetent activity. Only by evaluating a practice situation in terms of all four

162. Many administrative law attorneys in Washington, D.C. are retained by law departments of major corporations to represent corporate interests before specific federal agencies. The relationship between the "client" and administrative lawyer is highly defined and there is little opportunity for malpractice to occur. Conversely, a lawyer involved in a bitter domestic relations dispute may often find it difficult to ever define his relationship with the client and identify the hierarchy of the client's interests in the dispute. This instability can easily foster conditions that generate malpractice.

elements can a meaningful prediction of malpractice be made.

Since all elements are common to most professional transactions involving outsiders, attaching a relative value to each element should not be difficult. Then the elements can be combined to obtain some composite assessment. To illustrate this composite assessment, the four elements can be depicted as four equal length lines radiating from the same point at right angles to each other. The lines are scaled from zero to ten, with the ten located at the end of each line and representing the highest probability of incompetence regarding that element. The value scaling on each of the lines is not uniform for every line, but is logarithmic depending on the element to which the value is attached.[163] For any particular fact situation or class of situations, a point can be located on each line representing an assessment of eaeh element. Then, the lines can be connected to form a four-sided figure. When the area within this figure is large, it reflects a high probability of incompetence. A small enclosed area implies a low risk of malpractice or incompetence. For example, assume a recent law school graduate with modest intellectual ability establishes his own practice in New York City and first seeks to defend a banking corporation in an antitrust action. The display of the four elements involved suggests a high likelihood of malpractice.



163. The use of "logarithmic" here is not intended to imply mathematical accuracy; it is merely intended to be graphic illustration of relative unit values.

By using this crude calculus, it should be possible to identify situations with a high risk of incompetence for any lawyer/constitutency/task/environmental mix.[164] Further, by holding all elements constant except the constituency, it is possible to examine how various high-risk situations for one constituency might impact on the others necessarily involved. This information should eventually permit evaluation of various solutions to identify the one which produces the greatest reduction of risks for all interests with the least resource commitment or change.[165]

Apart from identifying the problem areas and their relative impact on various constituencies, the calculus can be employed to evaluate how changes in other elements can affect malpractice probability concerning specific interests. For example, court structures and procedures can be varied to determine change in effect upon malpractice probability. This information can then be correlated with associated costs in time, dollars, and human resources. Once the optimal procedures are identified, the task and client elements can be varied to determine the range over which the procedures will satisfactorily retard incompetence.

In a more complex vein, possible simultaneous changes in two or more elements can be analyzed to identify combinations of changes, which over time would most quickly or efficiently reduce the probabilities of incompetence in specific practice areas. This might reveal that certain corrective measures must be applied to more than one element at a time in order to achieve optimal results with minimal resources.[166]

There are many improvements that can be made on the calculus to enchance its quantitative capacity. However, the number of

164. If the calculus is used to survey the potential of malpractice in many different situations, it will obviously be necessary to vary the precise factors reflected by each axis. For example, in one situation it may be best to have the client axis reflect level of sophistication concerning the legal task involved while in another situation the axis should reflect the complexity of the client's make-up.

165. Much current legal analysis advocates that improvements to one group's interests be evaluated in part with reference to the impact such improvements will have upon the interests of other groups. Although this approach has great merit, there are problems with this utilitarian approach which are nicely discussed in Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

166. For example, in certain tax practice areas undergoing rapid change CLE and recertification requirements can significantly reduce incompetence resulting from practitioners not keeping up-to-date. However, if many area developments are characterized by increased complexity rather than mere change, CLE may not help practitioners who have limited capacity to operate in complex technical environments. Consequently, further reduction of incompetence probabilities may require simplification of tax provisions or some specialization within specialties. Another approach might focus on screening out such "limited capacity" practioners, but this may not be possible in law areas involving clients both in low as well as high density population areas.

elements in the calculus should not be expanded much beyond four. If new elements were added, so many permutations would be involved that the calculus' utility to decision-makers would be minimal. If the calculus remains fairly simple, decision-makers can easily keep all the factors in mind.[167]

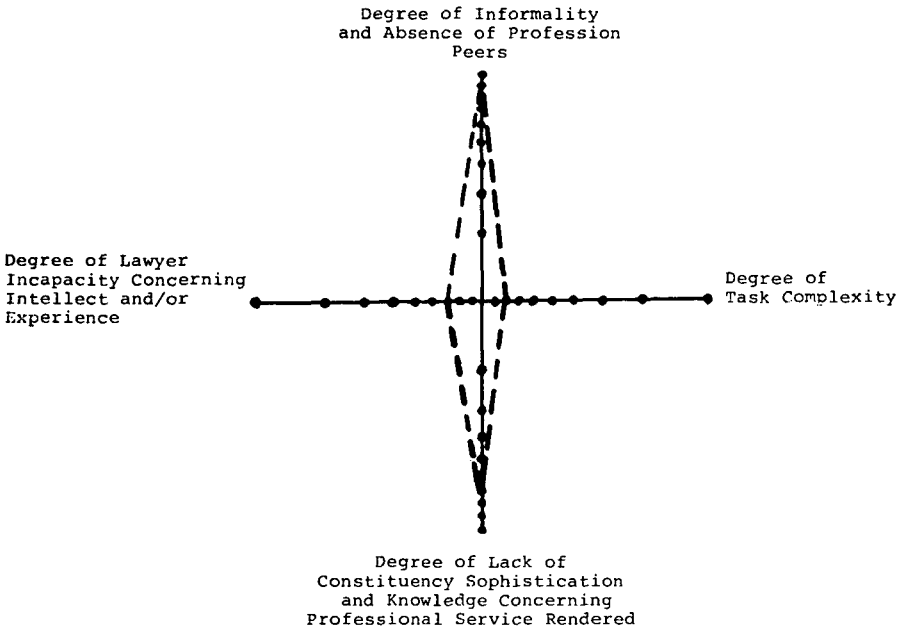
The following section demonstrates ways the calculus might be employed in different situations to measure probabilities of incompetence and to evaluate proposed approaches for reducing or eliminating such incompetence.

VII. Malpractice—Development of Future Approaches

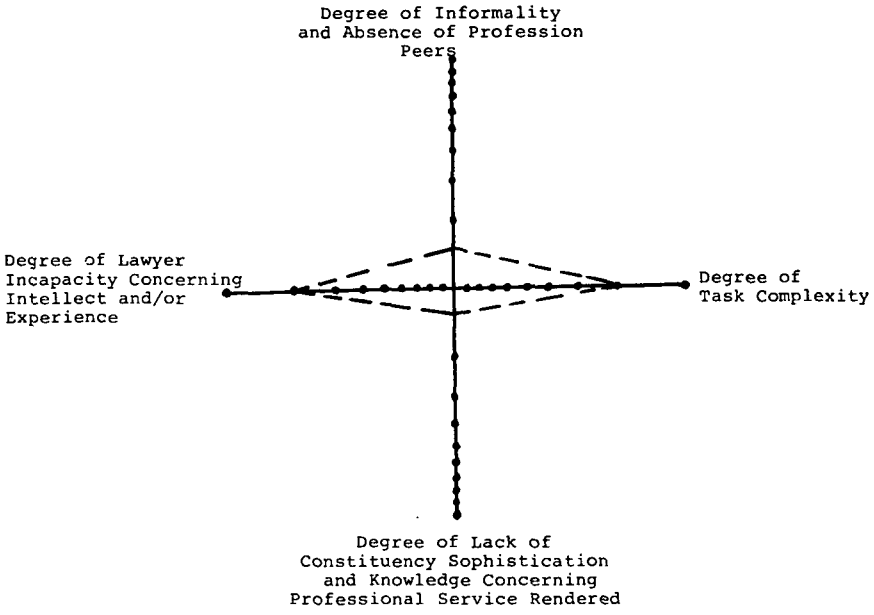
A. *Analysis of Some Client Problems and a Suggested Solution*

Numerous legal transactions involve only lawyer and client. Advice is given, documents are prepared, and decisions are made on the basis of such advice and documents. Most lawyer involvement is routine and the impact of the lawyer is rather narrow; few beyond the client are interested or affected. Further, most clients have little sophistication regarding the transaction's legal aspects and do not have repeated contact with a lawyer. Finally, the enviornment associated with the transaction is often extremely informal. There are few prescribed procedures and little involvement of other professionals. Thus, if such a transaction is graphically depicted according to the calculus it would appear as follows:

167. Although it is essential for simplicity to limit the number of elements in the calculus, this does not preclude consideration of attributes each element connotes when plotting a value on an axis. For example, when considering the lawyer element, sub-elements which may be important are such characteristics as (a) intellect, (b) experience, (c) specialty, etc. The same procedure can be applied to each of the remaining elements by dissecting the element into its pertinent sub-elements.



The interesting feature of these transactions with respect to the environment and client axes is that the probability of malpractice seems high, whereas the lawyer and task characteristics portend only limited probabilities of incompetent actions. It is logical to assume self-regulation is most effective when the greatest risk exists on the lawyer and task axes. These measure competence, and competence is subject to direct control by the profession. Conversely, self-regulation would appear least effective when the risk is caused by high values on the environment and client axes. Factors which affect values on these axes are not controlled by the profession. Further, high values reflect incapacity to even detect malpractice, thus the profession does not know when malpractice occurs in order to react in some fashion. The validity of this observation is most evident when the calculus is applied to disciplinary or admission proceedings where the courts are involved and the profession might be viewed as the client. Such a situation could be illustrated as follows:



Remedies for malpractice on these matters are clearly available through self-regulation.

Apart from the implications for self-regulation, the calculus suggests several other matters of importance. First, when the area within the lines is relatively great, the probability of incompetent actions is large enough to warrant attention. Second, incompetence will primarily involve deficiencies in performance and moral conduct rather than in skills and methods, since the tasks are uncomplicated and lawyer experience is presumably adequate for such tasks.

Despite the lack of client sophistication about these transactions, there can be little doubt that the forces noted in sections V(B) and V(C)(1) will enable them to perceive deficiencies in performance whether resulting from fraud, oversight, or some other cause. Further, such deficiencies will often prompt the client to seek redress. The mechanisms made available to such clients should ideally permit efficient redistribution of wealth to compensate for injuries suffered, to insure satisfaction of the legal consumer, and to discourage recurrent deficiencies in the profession.

There are three basic alternatives available to resolve this twofold goal: (1) the profession disciplinary process; (2) court control of the bar; and (3) client suits. The discliplinary process has not met the first objective of client redress, and for reasons previously discussed seldom accomplishes the second. An exception regarding redistribution may exist where some malfeasance has been perpe-

trated by the lawyer,[168] such as fraud or absconding with client funds, and the client protection fund is relied upon to provide at least partial relief to the wronged client.[169] Here the redistribution goal is at least partially met. However, the Clark committee recommended that "payment from the fund would be made only after judicial determination that the loss had been the result of attorney misconduct",[170] and that a limitation be placed "on the amount a single individual can collect from a client security fund".[171] Thus, even in cases of payment under these arrangements the redistribution goal is significantly limited.

The present emphasis of greater court control over the practicing bar is also deficient in meeting the twofold goal of performance regulation and redistribution of wealth. Redistribution is totally ignored. Although this conceptual notion of regulation attempts to influence the thinking of lawyers about deficient performance, it fails. Court control of performance focuses on performance in legal forums, which the calculus indicates are not normally involved in the deficient performances under discussion.

Suits by clients against lawyers who have not performed competently represent the third alternative to the twofold goal. There are a number of theories upon which action against an attorney can be brought; some viable, some untried. Almost every legal malpractice action can be "said to partake of elements both *ex contractu* and *ex delicto*. . . ."[172] The primary vehicle for redress is negligence, but other actions based on contract or perhaps the Uniform Commercial Code's express and implied warranty of sale provisions might lie.[173] Lawyers' fees might be questioned on the basis of unjust enrichment. This, in turn, might lead to a *quantum meruit* basis of payment.[174] The measure of damages would differ depending upon the election of remedies and the theory of action.[175] The facts of a particular action may preclude one or more theories of legal malpractice, but that is a matter of practical judgment.

Of the suit alternatives available, negligence seems the most

168. State *ex rel* Benton v. Baum, 14 Mont. 12, 35 P. 108 (1894).

169. *Supra* note 149, at 189.

170. *Id.* at 191.

171. *Id.* at 190.

172. Jackson v. Zito, ___ La. ___, 314 So.2d 401, 404 (1975).

173. This is not an accepted theory but is raised in the court's discussion of the scope of the U.C.C. in Newark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969).

174. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), found fixed fee schedules impermissible. An alternative to fixed fees might be the value of the work done. Such a scheme of remuneration would presumably place a premium on quality work. In a seller's market the value of the product may well induce the buyer to pay the kind of fees such a notion implies. The concept is analogous to the corporate house counsel notion.

175. Harding v. Bell, 265 Ore. 202, 508 P.2d 216, 217 (1973).

logical for achieving full redress and deterrence. An action for negligence arising from the activities of an attorney is not fundamentally different from other, more typical actions for negligence.[176] The elements of a legal cause of action for negligence are: (1) the duty as a lawyer to use such skill, prudence, and diligence as other members of the legal profession commonly possess and exercise; (2) a breach of that duty; (3) proximate causal connection between negligent conduct and the resulting damage; and (4) actual loss or damage resulting from the attorney's negligence.[177]

The duty element of the case involves two major subparts: the standard duty which the lawyer owes clients in general, and the nature of the duty owed to the specific client involved in the action. For the first subpart of duty, the RESTATEMENT OF TORTS 2D. supports the locality rule for determining the standard of care to be applied. The RESTATEMENT indicates that:

> One who undertakes to render services in the practice of a profession . . . is required to exercise the skill and knowledge normally possessed by members of that profession . . . in good standing in similar communities.[178]

A number of states have adopted the locality rule, requiring a lawyer to "exercise that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality."[179] Other states use a standard of care based on the skill and diligence exercised by lawyers within the state. This approach is reflected in the Montana case of *Clinton v. Miller* where an attorney title examiner was held to a standard of familiarity with "the statutes and decisions of his own state, and he must apply settled rules of law that should be known to all conveyancers."[180]

The assessment of the second subpart, a lawyer's duty to specific clients, is a more complex matter. Judge Learned Hand, in *United States v. Carroll Towing Company,*[181] indicated that three variables must be taken into account in establishing this aspect of duty. Although the case involved the duty of a barge owner, it can easily be applied in the context of a legal malpractice action. Stated as such, a lawyer's duty to provide against resulting injuries to a

176. Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971).

177. PROSSER, LAW OF TORTS, p. 143 (West, 1971).

178. RESTATEMENT (2D) OF TORTS §299A (1965).

179. Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283, 1290 (M.D. La. 1973); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972); Calandro Development, Inc. v. R.M. Butler Contractors, Inc., ___ La. App. ___, 249 So. 2d 254 (1971).

180. Clinton v. Miller, 124 Mont. 463, 226 P.2d 487, 498 (1951).

181. United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947).

client would be the function of three variables: (1) the probability of harm to the client if a lawyer with particular capacities undertakes a specific legal task in a particular environment; (2) the gravity of resulting injury to the client; and (3) the burden of taking adequate precautions to protect the client's interests by reducing the probability that the harm will occur. The calculus can be used to establish a value for the first variable in a particular situation. Assignment of values to the second two variables is extremely difficult, but probably should be guided by the following principle:

> As the number of alternatives in what can possibly be done on the client's behalf narrows, with a concomitant decrease in alternative approaches if the first choice is incorrect, the probability of harm to the client if the attorney is negligent increases. Thus, while the standard applied to the attorney's conduct at various stages of the transaction is the same, that of a reasonably prudent attorney exercising the care, skill, and knowledge of members of the profession, a greater burden of precaution in expected performance exists as each step in the proceeding becomes more critical to the client's cause.

Although this type of formulation is complex and requires careful application, both the profession and the client require such incrementalization of duty. Negligence actions for lawyer malpractice, as they are now conducted, allow juries of laymen to be guided solely by instructions employing the nebulous standard of the "reasonable and prudent attorney". Thus, a defendant attorney is subjected to the layman's broad discretion in interpreting this standard.

The profession could analyze various broad legal subjects and identify distinctive stages of the lawyering process within such subjects. These stages could then be related to specific legal activities deemed necessary to properly serve normal client interests associated with such activities. In essence the profession, through internal activities, could articulate the requisite standard of performance for the stages of any legal transaction. The profession would thus be able to transform the broad discretion of the jury into a form of self-regulation by the bar.

Once the dimensions of the duty element of the negligence case have been established, the issue of breach of that duty can be resolved without great difficulty. However, if the duty issue is not properly dissected, establishing a breach can become an extraordinarily messy problem. Admittedly, in an uncontested case, such as drafting a will or preparing a contract, lack of success in achieving the client's objectives may in itself be conclusive evidence of breach of a duty if the lawyer undertook the task without caveat. However, in contested cases, success cannot be the measure of

breach of duty, since the transaction necessarily involves lack of success on behalf of one of the two clients. In such instances the lawyer can only be held to perform in a reasonable and diligent manner; not to be a guarantor of results.[182] Thus attention must again shift back to a proper definition of duty.

The elements of proximate cause and damages, which are also critical to a legal malpractice case, present as many problems as duty and breach of duty. However, these problems seem to be greatest where contested issues are present.[183] In uncontested situations, the problems are much less severe and the negligence action is a rather efficient tool.

If legal malpractice actions are encouraged as the vehicle for dealing with incompetent legal performance in uncontested situations, one problem still remains. In the absence of the profession's establishment of rather detailed standards, most of the critical issues in the case will be decided by the jury rather than the judge. Consequently, if there develops within the public a general dissatisfaction with the legal profession, it can be expected the jury will be harsher on individual lawyers than is justified under the particular circumstances of a case. Such individual lawyers would be bearing an unfairly large part of a burden better placed on the profession as a whole. Obviously the only way to resolve this problem is for the profession, through internal procedures, to develop standards that have the effect of depriving the jury of great discretion, while at the same time making it easier for the jury to properly assess liability in cases where lawyer malpractice is evident.

B. Summary Analysis of Client Groups and a Suggested Solution

The representation of group interests can involve the whole spectrum of legal principles, institutions, mechanisms, and legal personnel. Unrepresented interests may seek initial representation among law students, thereby hoping to stimulate production of legal personnel qualified and interested in serving their needs.[184] Other

182. Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164, 167 (1958).

183. In Feldesman v. McGovern, 44 Cal. App. 2d 566, 112 P. 2d 645 (1941) the court held that the plaintiff in a malpractice action must plead and prove that attorney performance of the negligently omitted act would have clearly produced benefits for the plaintiff. Satisfying such a burden of proof could be difficult if lawyer action did not automatically entitle the plaintiff to specific benefits. Conversely, the burden would be easily met in situations where timely filing of a tax refund request would automatically entitle the plaintiff to a refund.

184. Legal aid clinics in many law schools have existed for decades to provide students with some practical experience and extend limited legal services to groups and individuals unrepresented due to financial deprivation. During the late sixties these programs emerged as a major contender for law school instructional resources. See generally E. KITCH, GOALS, MODELS AND PROSPECTS FOR CLINICAL LEGAL EDUCATION (1970); Gorman, *Clinical Education:*

unrepresented interests may rely on an experienced lawyer to mobilize their members into a cohesive unit to enhance their position vis-a-vis other highly represented groups.[185] Group interests presently represented may elect to switch the legal forums or substantive bodies of law relied upon to obtain adequate recognition of their interest.[186] The list of such groups could be enlarged, but these examples indicate that if the full range of group interests is illustrated according to the calculus, no definite patterns would exist concerning any of the four elements. The level of client sophistication would

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A Prospectus, 44 S. CAL. L. REV. 537 (1971); Redlich, *Perceptions of a Clinical Program*, S. CAL. L. REV. 574 (1971); Pye, *Clinical Education in the Law Schools*, 39 BAR EXAMINER 9 (1969). Financial and emotional encouragement for the growth came from several organizations like CLEPER as well as law students who demanded more practical experience from their curricula. See for example Pincus, *Clinical Practice Innovations in Law Schools*, 28 BRIEFCASE 47 (1969).

The ultimate linkage between unrepresented interests and curriculum restructuring is reflected at schools like the Antioch School of Law in Washington, D. C. The School's founders, Jean and Edgar Cahn, designed the curriculum, faculty composition and admission policies with the goal of producing lawyers that could best serve individuals and groups currently unrepresented. See ANTIOCH SCHOOL OF LAW 1973-74 CATALOG AT 5-6. For a fuller statement of the Cahns' philosophy concerning legal education see E. Cahn & J. Cahn, *Power To The People or the Profession?—The Public Interest Law*, 79 YALE L.J. 1005, 1025 (1970).

185. Labor unions, tenant organizations and various minority groups have used experienced lawyers for many years to enhance their relative bargaining power with natural adversaries. More recently individual lawyers like Ralph Nader and Nicholas Johnson have used specialized legal expertise to develop organizations that foster unrepresented interests and mobilize financial support for such interests. See for example ACTON & LEMONDE, RALPH NADER: A MAN AND A MOVEMENT (1972); BUCKHORN, NADER: THE PEOPLES' LAWYER (1972); Reich, *Success on a Shoestring*, 5 JURIS DOCTOR 43 (July/August 1975); Schorr, *Alan Morrison: Even When He Loses, He Wins*, 6 JURIS DOCTOR 39 (Jan. 1976).

186. During the last decade many environmental and consumer groups became disenchanted with the "hearing" given their interests by administrative bodies like the Federal Power Commission, U. S. Forest Service, Civil Aeronautics Board and Department of Transportation. Consequently, they often re-allocated their advocacy resources toward the judiciary in hopes of developing judicial principles that would require agencies to accord them greater deference. For example see Bieber, *Calvert Cliffs' Coordinating Committee v. AEC: The AEC Learns the True Meaning of the National Environmental Policy Act of 1969*, 3 ENVIRONMENTAL LAW 316 (1973). In other instances under-represented groups have advocated dissolution of agencies deemed to be structurally biased against their interests. The breakup of the Atomic Energy Commission into the Energy Research & Development Agency and the Nuclear Regulatory Commission was stimulated in part by claims that safety considerations of nuclear power development as well as the search for alternative energy sources were treated as stepchildren whenever in conflict with optimal development of nuclear power reactors. For example see, *Symposium-The Nuclear Power Plant Licensing Process*, 15 WM. & MARY L. REV. 487 (1974); Roisman, *Suing for Safety*, 10 TRIAL 13, 187 (Jan./Feb. 1974). For more details on these developments see E. JOHNSON, JR., JUSTICE AND REFORM (Russell Sage Foundation, 1974); S. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE (ABF 1974); S. BRAKEL, WISCONSIN JUDICARE: A PRELIMINARY APPRAISAL (ABF 1972); Hallauer, *The Shreveport Experiment in Prepaid Legal Services*, 2 J. LEGAL STUDIES 223 (1973); Getman, *Critique of the Report of the Shreveport Experiment*, 3 J. LEGAL STUDIES 487 (1974); and *Symposium—Legal Service Delivery Systems*, 4 U. TOLEDO L. REV. 1 (1973). For additional references see Brickman, *Legal Delivery Systems-A Bibliography*, 4 U. TOLEDO L. REV. 465 (1973).

be as highly variable as the formality of the decisional environment, and the complexity of the tasks. Similarly, lawyer characteristics would vary from an intellectual ignorance on and lack of experience with novel legal tasks performed for emerging client groups, to high levels of experience and intellect regarding traditional tasks and long-established group interests. If the values on all these axes were averaged and those averages connected by lines, the resulting shape would be a sizable square reflecting considerable probabilities of malpractice on all axes. This, in turn, would imply that approaches for reducing the probabilities of malpractice could be obtained from self-regulation or mechanisms external to the profession.

Analysis of the spectrum of group interests now being served, or capable of being served by the profession, suggests that malpractice frequently results from deficiencies in current skills and methods. These deficiencies stem from problems with lawyers as human resources as well as from the current rigidity in the definition of legal tasks. Both deficiencies are probably solvable through self-regulation. Continued absence of profession self-regulation will prompt groups now inadequately represented to fashion their own remedies within the legal system or to promote their interests outside the system.

A reduction of these representational deficiencies with cost effective self-regulation will involve approaches that do not rely heavily on error detection through peer group review. Since many of the legal services needed by groups are unconventional and frequently in a rapid state of evolution, peer review would only serve as a retarding force for resolving deficiencies. Further, since the legal forums involved in representing these groups are highly diverse, as is the level of client sophistication, not much reliance could be placed on the environment or client groups to detect incompetence regarding newly-developed skills and methods, although such client groups would surely respond to inadequacies in performance. Consequently, it seems logical to develop approaches that rely more on constructive monitoring and positive incentives than on a deterrence philosophy.

The American Bar Foundation, and similar centralized research activities of the practicing bar, represent perhaps the best long-term solution for reducing professional incompetency regarding servicing group interests. Annual reports of the ABF depict an amazing amount of constructive research aimed at analyzing the needs of various client groups and designing approaches for servicing those needs, which rely heavily on the profession and its institutions. These studies indicate that much inadequate representation of these groups derives not from incompetence, but rather from a lack of identification of the needs of groups as opposed to indivi-

duals. Once these needs are properly identified, legal scholars and practitioners can satisfy them through creative application of existing principles or the establishment of new principles and institutions.

An excellent example of the utility of such research regarding professional incompetence in meeting group needs relates to the distribution of legal services. Research in the early sixties disclosed great gaps in the profession's capacity to service many people that could benefit from attorney assistance. The information was eventually translated into governmental programs like the OEO, as well as experimental projects such as the Shreveport and Wisconsin plans for prepaid legal services.[187] Now the ABA is completing a substantial study of the middle class's legal needs.[188] This study will surely spawn constructive approaches for aiding the middle class with their legal problems without excessively taxing their financial resources, already dwindling from inflation. Of course, these approaches merely identify long-standing needs not previously served. The profession should also undertake research to anticipate the legal needs and problems of groups so that appropriate legal services are available at the inception of problems. Such foresight can help prevent some problems from festering into the crises, which can easily develop in our complex, interdependent society.

Obviously, basic research on group needs is the starting point for positive improvement in the profession's service capabilities, but unselfish initiatives for efficiently meeting these identified needs are also required. If the profession actively promotes the use of paralegals, public-interest law firms, clinics, and specialists to meet specific group needs, it can simultaneously ensure development of these special approaches consistent with existing professional elements and concepts. If the profession resists such approaches or gives only grudging support,[189] the approaches are unlikely to develop in coordination with the profession's self-regulation activities.

C. Thoughts on the Interests of Society and a Suggestion.

Although the profession is preoccupied with rendering services to individual clients and fashioning responses to the evolving needs of client groups, jurisprudential literature has long recognized that broad social interests are also served by a vital legal profession. The

188. See B. CURRAN & F. SPAULDING, THE LEGAL NEEDS OF THE PUBLIC (ABF 1974) and Special Issue, *Survey of Legal Needs,* 3 ALTERNATIVES 1 (Jan. 1976).

189. For discussion of such resistance see R. MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 186-197 (ABF 1972); Riedmueller, *Group Legal Services and the Organized Bar,* 10 COL. J. LAW & SOC. PROB. 228 (1974); and J. Falk Jr. & S. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services,* 25 HAST. L. J. 599 (1973).

cancerous invasions of government into private lives are being restrained daily by representation of individuals and group interests.[190] Further, government activities are often made more efficient by the efforts of lawyers toward the timely modification of existing governing mechanisms, and the invention of totally new legal institutions and principles. Unfortunately, the latter efforts toward direct service of public interests are not viewed as fundamental profession responsibilities. Consequently, self-regulation standards have not been developed to ensure that lawyers discharge these responsibilities with the highest degree of skill. This situation seems destined to continue, even though the cost of incompetence in fashioning legal institutions, principles, mechanisms, and personnel to better serve broad public interests, easily exceeds the cost of incompetence in the representation of individual interests.[192]

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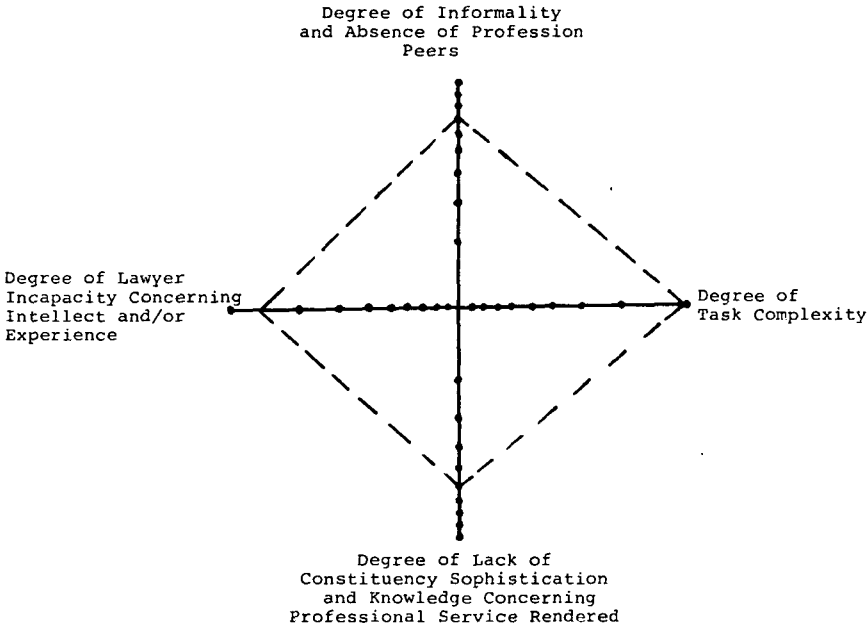
190. For diverse discussions and perspectives on this perpetual conflict see A. WESTIN, PRIVACY AND FREEDOM at 171-210 (1967); E. COWAN, N. EGLESON & N. HENTOFF, STATE SECRETS at 261-333 (1974); Kalo, *Deterring Misuse of Confidential Government Information: A Proposed Citizens Action*, 72 MICH. L. REV. 1577 (1974); Wong, *Ravin v. State: A Case for Privacy and Possession of Pot*, 5 UCLA-ALASKA L. REV. 178 (1975); Shattuck, *Tilting at the Surveillance Apparatus*, 1 CIVIL LIBERTIES REV. 59 (1974); Denenbery, *Administrative Searches and the Right to Privacy in the United States*, 23 INT. & COMP. L. Q. 169 (1974); Sindell, *Kent State: Opening the Doors*, 10 TRIAL 43 (July/Aug. 1976); Comment, *Privacy, Law Enforcement, and Public Interest*, 36 MONT. L. REV. 60 (1975). For an interesting overview of the conflict see the Jan./Feb. 1975 issue of TRIAL (Vol. 10) which is dedicated to the topic.

191. Organization of the Office of Satellite Communications within the FCC, division of the AEC into the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC), and creation of the International Telecommunications Satellite Consortium (INTELSAT), and the Legal Services Corporation, are excellent examples of how lawyers as legislators, administrators and legal technicians have used organizational innovations to promote diverse social interests with optimal efficiency. For background on some of these developments see, e.g., HOUSE COMM. ON GOVT. OPERATIONS, ENERGY REORGANIZATION ACT OF 1973, H.R. REP. NO. 707, 93d Cong., 1st Sess. (1973); SENATE COMM. ON GOVERNMENT OPERATIONS, ENERGY REORGANIZATION ACT OF 1973, S. REP. NO. 980, 93d Cong., 2d Sess. (1974); T. Jacks & D. Raff, *The Bureaucracy of Power*, 10 TRIAL 28 (Jan./Feb. 1974); J. PELTON, GLOBAL COMMUNICATIONS SATELLITE POLICY (Lomond Books 1974). However for a critical review of the INTELSAT innovation see M. KINSLEY, OUTERSPACE AND INNER SANCTUMS: GOVERNMENT, BUSINESS, AND SATELLITE COMMUNICATION at 112-129 (1976).

Lawyers seeking to develop and promote reforms in government agency processes have made significant progress through the Administrative Conference. For a sampling of the scope of these activities see ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1974-75 ANNUAL REPORT at 11-67 (March 1976). Even without the benefit of organizations, individual lawyers have initiated significant reforms in legal principles such as no-fault insurance. See R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

192. As mentioned earlier, the conceptual framework of OSHA and its implementing regulations have caused major problems, which could have been anticipated by lawyers trained to be sensitive to side effects as well as the focus effects of major legal initiatives administered through traditional bureaucratic organizations. See generally the July/Aug. 1973 (Vol. 9) and Sept./Oct. 1975 (Vol. 11) issues of TRIAL which are devoted to a general discussion of OSHA from many perspectives. It has also been argued by some prominent scholars that many FDA regulations have produced adverse side effects that overshadow the desired benefits. Presumably perceptive legal draftsmen could have anticipated such prob-

In the light of the high cost of this incompetence, it would seem prudent to allocate some resources to understanding its systemic impact on direct service to public interests. If we again employ the calculus and view various broad public interests as the client, many interesting insights should result as we plot the values for the remaining three axes. In most instances, the complexity of the legal tasks rates very high, the environmental formality is very low, and lawyer training and experience is also low.



The resulting square is the largest of any of the three constituencies. If self-regulation focuses directly on the profession's incompetence in serving these interests, substantial improvements could result almost immediately. Similarly, the probabilities of harm from incompetence can be substantially reduced by efforts undertaken outside the profession.

Although almost any form of self-regulation could be of value, it seems illogical to employ an approach that dwells on deterrence, since detection will be most difficult due to the amorphous and unsophisticated nature of the constituent interest as well as the absence of formality within the environment. Further, many of the

lems. See for example Friedman, "Frustrating Drug Advancement," Newsweek, Jan. 8, 1973, at 49 and Friedman, "Barking Cats", Newsweek, Feb. 17, 1973, at 70. Similarly other scholars have suggested that many corporate controls drafted by lawyers have failed to produce desired results because of a basic professional ignorance of the realities of corporate and organizational behavior. See C. STONE, WHERE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).

tasks lawyers could undertake in direct service to society could also be undertaken by non-professionals. There would be little incentive to detect lawyer incompetence merely to improve the service received from that profession. It is more likely that the general public would simply solicit the services of the other groups, which have better performance records.[193]

Some suggestions for reducing incompetent service to client groups might also be of value here. Research, such as that carried out by the ABF, can improve understanding of broad social systems in which the "public" lawyer must operate.[194] Research and educational institutions can also aid in fashioning better skills and methods for executing these unique responsibilities.[195] Such improved skills and methods, as well as increased knowledge about the environment in which they are applied, can reduce the probability of incompetent service to the public interests, since these factors will tend to generate forms of specialization. However, some attempt should also be made to directly improve lawyer performance. Obviously the negligence approach is ill-designed for this objective. The extensive nature of the damages flowing from incompetent performance in the public sector would make redistribution of wealth a totally unrealistic remedy, and the diffuse nature of lawyer activities affecting the general public interest would make the deterrence effect of negligence litigation *de minimus*.

A better way to deal directly with incompetent performance is to foster competence directly, rather than seeking to eliminate incompetence. A simple way to undertake this task is to develop a system of prizes for lawyers who, in their daily practice with individuals and client groups, discharge their obligations to those groups through the development of legal principles, institutions, and mech-

193. Although lawyers have been traditional developers of the basic principles and statutory details of government programs affecting broad segments of society, other disciplines are challenging lawyers' supremacy on such matters. Economists have assumed considerable prominence during the past decade and specialists in planning, budgeting, and business administration will also challenge lawyer supremacy in the public sector as the machinations of government at all levels become more complex. For an interesting summary of forces underlying the profession's decline see Special Report, "The Troubled Professions," Business Week, Aug. 16, 1976, at 126.

194. See AMERICAN BAR FOUNDATION ANNUAL REPORT FOR 1975 at 5-47 (1976).

195. The following articles indicate the breadth and depth of current research: Rehbinder, *Development and Present State of Fact Research in Law in the United States*, 24 J. LEGAL ED. 567 (1972); Cavers, "Non-traditional" Research by Law Teachers: Returns from the Questionnaire of the Council on Law-related Studies, 24 J. LEGAL ED. 534 (1972); Clapp, *Legal Research and Legal Development: The Role of a New Jersey Law Institute*, 28 RUTGERS L. REV. 1053 (1975); and *Conference—Developments in Law & Social Sciences Research*, 52 N.C. L. REV. 1-120 (June, 1974). However, some view these activities to be less than needed. For example see Gazell, *Overdue Revolution Deferred: Researching the Law*, UTAH L. REV. 22 (1972).

anisms that simultanously promote the broad public interest.[196]

Such prizes should be sufficiently widespread to reward innovations, which foster public interests at the local, state, and federal levels. Screening panels would evaluate the various entries submitted in competition for the prizes. These screening panels would ideally involve both lawyers and non-lawyers to ensure that contributions are evaluated from a broad perspective. The screening panels, apart from ensuring that prizes are awarded for the best performances in the public interest, would also inculcate panel members with the many ways in which the profession can directly promote the public welfare. Eventually the publicity given the entries, as well as the knowledge acquired by the screening panel members, would allow the profession to evolve professional standards which would directly ensure the development of skilled public administrators.

VIII. Conclusion

The issue of incompetent professional practice is extremely complex. Once one delves into the subject area in enough depth to appreciate its complexity, it is, as Alice found, difficult to return to a single perspective. Unfortunately, during the course of this article we have not had the time to carefully examine many of the interesting boulders encountered on the terrain of professional malpractice. We have instead concentrated only on elements of major importance, the mountains and valleys of that terrain, and have attempted to interrelate them in a manner that we believe may advance thoughtful consideration of this important subject. Although the article raises many issues, it is probably best to conclude with an assessment of what we feel are the most important among them.

In our minds any meaningful treatment of professional incompetence must simultaneously take into account the lawyer, the task being performed, the constituencies directly served by the lawyer, and the environment embracing the lawyer, constituency, and task involved. Programs for dealing with professional incompetence that fail to consider each of these elements, and their interrelationships, will fail in the long term to resolve the problems for which they were designed.

Once the four elements are taken into account, it is obvious that self-regulation alone cannot adequately deal with the incom-

196. Examples of legal activities worthy of such prizes are: innovative use of paralegals and new technology like videotape to accelerate case disposition and reduce costs; novel applications of the condominium concept to multiparty business ventures; and new approaches for financing consumer treble damage actions against large enterprises, such as issuing stock to plaintiff participants to raise money for litigation costs.

petence issue. In some areas, no doubt, self-regulation can do the whole job. In other situations, professional incompetence can be effectively limited only by forces outside the professsion. However, there remains a vast area where optimal solutions require a combination of self-regulation and external involvement. The profession will do itself and the public a favor if, in these areas, it takes the initiative in establishing basic standards for use by outsiders to deal with professional incompetence. Conversely, the profession would do well to refrain from claiming total supervision of the processes for dealing with such incompetence. The public is now too wise to allow the fox to guard the henhouse.

In developing these basic standards, the profession must not dwell excessively on the morality of conduct. To remain a guiding force in dealing with incompetence, the profession must aggressively develop standards on skills, methods, and performance. Once established, these standards will both aid outsiders in taking effective action in dealing with incompetence as it concerns their interests, and will simultaneously restrain the range of discretion outsiders have in dealing with matters that directly affect the profession.

Finally, the most important point in the article is that any notion of professional competence must recognize that the profession has a direct obligation to society. As our society becomes more complex, the importance of this direct obligation to society increases. We have long been fundamental participants in the development of public institutions for serving public needs. However, it is time to recognize that, in addition to rights of participation, we have the obligation of participation, because we have unique and valuable perspectives on the mechanics of human and institutional behavior. We cannot hope to fulfill this obligation without recognizing minimal standards of performance and taking steps to ensure that those minimal standards are met by all who engage in this type of professional activity.